

TAGORE LAW LECTURES

1910.

Commercial Law in British India

INCLUDING

THE RULES OF INTERNATIONAL LAW, THE LAW AS
TO INTERPRETATION OF COMMERCIAL
CONTRACTS, TRADE USAGES,
AND THE SALE OF GOODS

BY

C. O. Oliver
C. O. REMFRY, B.A., LL.B. (Cantab.)

Barrister-at-Law, and Advocate of the High Court of Calcutta



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TO
SIR LAWRENCE JENKINS, K.C.I.E.,
Chief Justice of Bengal,

THIS BOOK
IS
BY HIS LORDSHIP'S PERMISSION,
MOST RESPECTFULLY DEDICATED.

INTRODUCTION.

The following pages contain in an enlarged form the Tagore Law Lectures delivered by me in the University of Calcutta.

As regards the sale of goods and trade usages an attempt has been made to collect all the Indian and all the relevant English decisions on every point which has been judicially noticed up to the end of August 1912.

In the preparation of this book I have constantly consulted and made use of the following among other text books, Benjamin on Sale, Blackburn on Contract of Sale, Campbell on Sale of Goods, Chalmers on the Sale of Goods Act, Addison, Anson, Chitty, Leake and Pollock on Contract, Halsbury's Laws of England, Page and Beach on Contract, Scrutton's Bills of Lading, Aske on Trade Usages, and Mayne and Sidgwich on Damages. I must acknowledge the great assistance which I have derived from these authors, and more particularly from Benjamin on Sale. Had not the Contract Act introduced into India numerous changes from the Common Law in obscure, unsatisfactory and contradictory language, the Calcutta University would not have selected the present topics for a Tagore Law Lecture.

The table of contents, usual in text books, has been curtailed as the index is, it is hoped, sufficiently complete to enable a ready reference to any point which this book contains.

The Calcutta University allows but a limited time for the publication of the Tagore Law Lectures, but it is hoped that in spite of its imperfections, this book will be of use to the profession.

C. O. R.

1st October, 1912.

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P. 23, l. 7, *delete* "is."

P. 108, l. 2-3, for "the chapter on" *read* "a contract
 for."

P. 121, in marginal note to § 116 for "tender"
 read "under."

P. 141 n. 8, the reference to *Walker v. Nussery* is l. J.
 Ex. 120.

P. 182, l. 10, *delete* "the buyer of."

P. 186, n. 1, for "s. 182" *read* "§ 182."

 n. 3, for "s. s. 119, 182" *read* "§ § 119, 182."

P. 230, l. 27, for "property" *read* "properly."

P. 383, l. 1, for "after" *read* "before" and for "ended"
 read "begun."

P. 396, l. 4, for "representatives" *read* "representation."

P. 470, l. 18, for "carried" *read* "barred."

P. 477, l. 2, for "damages" *read* "remedies."

P. 610, l. 26, for "ascertained" *read* "unascertained."

P. 710, l. 7, for "non-compliance" *read* "compliance."

CHAPTER I.

The Sources of Mercantile Law as administered in British India.

The law administered by the Courts of British India consists, so far as it is the subject of enactments, of :—

§ 1.
**Statutory
Law in
India.**

- (a) Such Acts of Parliament as extend, expressly or by implication, to British India.
- (b) The regulations made by the Government of Madras, Bengal and Bombay before the coming into operation of the Government of India Act 1833, (3 and 4 Will. IV c. 85).¹
- (c) The Acts passed by the Governor-General in Council ² under the Government of India Act 1833, and subsequent Statutes.³
- (d) The Acts passed by the local legislatures since their re-constitution under the Indian Councils Act of 1861 (24 and 25 Vict. c. 67).
- (e) Regulations made by the Governor-General under the Government of India Act of 1870 (33 Vict. c. 3).
- (f) The Ordinances, if any, made by the Governor-General under s. 23 of the India Councils Act 1861 (24 and 25 Vict. c. 47) and for the time being in force.

To these may be added :—

- (g) Orders in Council made by the King in Council and applying to India.

¹ See the Digest of Statutes relating to India, published by the Indian Legislative Department.

² For the purely local extent of such Acts see *Knill v. Dumerque*, 1911, June 30, C. A. (1911) W. N.

159. (Act 33 of 1871: held not to prevent assignment of Indian Civil Servant's pension in England.)

³ Still found in the Bengal, Madras and Bombay Codes.

§ 1. (h) Statutory rules made under the authority of English Acts.

(i) Rules, orders, regulations, bye-laws and notifications under the authority of Indian Acts.

In the first place it will be observed that the present legislative authorities are the British Parliament and the Indian Legislatures; for the British Parliament from which the Indian authorities have derived all their powers, while granting the Governor-General in Council the right to make laws affecting British India subject to certain restrictions, and the Local Legislatures certain powers as far as their jurisdictions extend, has retained to itself the right to legislate for India. This right was expressly reserved for Parliament by section 51 of 3 & 4 W. IV. c. 85, and has been re-affirmed in the subsequent India Councils Acts under which the Governor-General in Council and the Local Legislatures have been given their respective powers. A recent statute passed under this reserved power, is the Merchant Shipping Act of 1894, and generally speaking, the British Parliament concerns itself only with Imperial affairs and leaves local matters to the Indian authorities.

The respective powers of the Indian Legislatures are defined by the various statutes referred to above, and a full account of these will be found in Ilbert on the Government of India. For the purposes of these lectures, it is not necessary to consider the details of such powers, but a short history of the law will suffice to make clear the present situation as regards mercantile matters.

§ 2. **Commercial Legislation.** Commercial Legislation was first introduced into India to meet the requirements of English traders, who had established themselves in the Presidency Towns, and who found it impossible to have recourse to any of the native tribunals. It was because the original demand came from English traders, and because it has always been considered by the English Legislature, as well as

by the Privy Council,¹ extremely desirable that the law § 2.
regulating mercantile contracts should, as much as possible, proceed on the same principle in all parts of the world, and especially that this uniformity should prevail in respect of England and its dependencies, that the mercantile law introduced into India is, broadly speaking, the English mercantile law.

English law, however, was not introduced at one time, and it is owing to this fact that there is a difference between the law of the Presidency Towns and of the Mofussil. The first Charters granted to the East India Company in the 18th Century were with respect to the Presidency Towns only, as being the only centres of English trade where it was thought advisable to impose any legislation, the Mofussil at that time being in an undeveloped state and there being no pressing demand for legal reforms. Under these Charters English Common and Statute law in force in England at the time was deemed to be introduced and in force in the three Presidency Towns so far as it was applicable to local circumstances, but, under the Charter of 1753, all suits and actions between "natives" only were excepted from the Jurisdiction of the English Civil Courts, unless both parties submitted to the determination of the Court. The details of these Charters are dealt with by Ilbert in his work on the Government of India, as also the subsequent legislation establishing the various Courts in India. For the present purpose it is sufficient to refer to the provisions of the English Act of 1781 (21 Geo. III. c. 70.) whereby the late Supreme Court of Calcutta was established and empowered to hear all cases between the inhabitants of Calcutta, but it was enacted that all matters of contract and dealing between party and party shall be determined in the case of Mahomedans by the laws and usages of Mahomedans, and in the case of Gentus (Hindus) by the

Difference
between
Presidency
Towns and
Mofussil.

Introduction
of Common
Law.

¹ *Dimech v. Corlett*, (1858) 12 Moore P.C. p. 229.

§ 2. laws and usages of the Gentus, and when one only of the parties was a Mahomedan or Gentu, by the laws and usages of the defendant. A similar Act was passed in 1797 relating to the Courts of Madras and Bombay. Under the Charters of the High Courts of Calcutta, Madras and Bombay, these provisions are, where no rule has been enacted by an Indian Code, still in force,¹ but as they were not included in the list of English statutory provisions, which under the India Councils Act of 1861 (24 and 25 Victoria c. 47), the India Legislatures are precluded from altering, they are subject to subsequent legislation, and have been almost entirely superseded by the Indian Codes.²

These provisions only apply to Presidency towns : in the Mofussil the law was and is different. There the Common and Statute Law of England has never been introduced, but the Courts are governed by Regulation III. of 1793, whereby it was enacted that the law to be administered in the Mofussil Courts was to be according to justice, equity and good conscience. This Regulation is still in force, and the same rule was repeated in the Bengal Civil Courts Act, XII. of 1887, section 37 and in the Madras Civil Courts Act III. of 1873, section 15. The Privy Council³

¹ In *Madhwa v. Venkataramanjulu*, (1903) 26 M. 662, 670, the Act of 1797 was assumed to be still in force : but this is not so. One survival of Hindu law seems to be the rule of Damdupat in Bombay, *Ali Sahib v. Shabji*, (1895) 21 B. 85, and Calcutta, *Nobin Chunder v. Romesh Chunder*, (1887) 14 C. 781. It does not apply in the mofussil, *Het Narain v. Ram Deni*, (1883) 12 C.L.R. 590. *Surjya v. Sirdhari*, (1882) 9 C. 825 : see *Anandrao v. Durgabai*, (1896) 22 B. 761 : or in the Madras Presidency, *Annaji Rau v. Ragubai*, (1888) 6 M.H.C. 400. This rule

was said to be abrogated as far as mortgages are concerned by the Transfer of Property Act, 1882, ss. 86, 88, *Madhwa v. Venkataramanjulu*, (1903) 26 M. 662. There is also a Mitakshaha rule as to interest by way of damages on wrongful refusal to pay a debt, which is recognised in Bombay, *Saunadanappa v. Shivbasawa*, (1907) 31 B. 354, but not in Madras, *Subramania Aiyar v. Subramania*, (1908) 18 M.L.J. 245.

² See *Madhub Chunder v. Rajcoomar*, 14 B. L. R. 75.

³ *Waghela Rajsanji v. Sheikh Masludin*, (1887) 14, 1. A. 87, p. 94.

has laid it down that equity and good conscience are generally interpreted to mean the rules of English law if found applicable to Indian Society and circumstances. The above provisions both as to the Presidency towns and the Mofussil, created a state of confusion and rendered it a matter of great difficulty to ascertain the law applicable to particular cases, as is graphically depicted in the report of the Judges of the Supreme Court of Calcutta in 1883, which led to the appointment of the Indian Law Commissioners who inaugurated the codification of Indian law. The present position is that when no Indian Code or other law applying to India enacts the law, the above provisions still govern Commercial transactions, and result in a difference between the law of the Presidency towns and of the Mofussil. § 2.

In other cases where there is no question of Mahomedan or Hindu law, their Lordships of the Privy Council¹ have laid it down that in the absence of any law or well-established custom existing in India on the subject, the English law may properly be resorted to in mercantile affairs for principles and rules to guide the Courts in this country to a right decision ; and in another case they said that where no particular usage or custom qualifying the Mercantile Law of England as between principle and factor, prevails, it is by the general Mercantile Law that the powers and duties of parties in consigning goods must be determined, for the courts of India do not recognise the law of England as the *lex fori*.² § 3.
When
English
Principles
apply.

These observations apply to the Mofussil as well as the Presidency Towns, where under the Charters referred to above the English Common Law, unless superseded expressly by Indian enactments, still obtains. The General

¹ *Molliwo March Co. v. Court of Wards* I.A. Sup. Vol. 86 ; *Dada v. Babaji*, (1865) 2 B. 38, 55.

² *Mertunjoy Chuckerbutty v. Cochrane*, (1865) 4 W.R. 1 P. C.; *Mayor of Lyons v. East India Co.*, 1 Moo. 1 A. 175.

§ 3. Mercantile Law referred to above is that part of the Common Law of England which refers to mercantile matters. It appears then that, subject to the special conditions of the locality, the English Common Law may be resorted to in all Indian cases for principles of Commercial Law.

**§ 4.
Common
Law.**

It is therefore necessary to consider the Common Law of England. The Common Law of England is that body of law which has been judicially evolved from the general custom of the realm and has existed according to judicial theory from beyond legal memory ; and accordingly when a new point arises, it is decided according to the Common Law and the decision is not regarded as an addition to the Common Law, but merely an expression or exposition of the pre-existing law.¹ The Common Law therefore introduced under the Charters is the Common Law as now understood in England, and not the interpretation which prevailed in the 18th century. With the Common Law of England is incorporated the Law Merchant and the Law Maritime, and both of these refer exclusively to mercantile matters.

**§ 5.
Law
Merchant.**

The Law Merchant or *lex mercatoria*,² is a body of legal principles founded on the customs of merchants in their dealings with each other, and though at first distinct from the Common Law and administered in its own courts in the staple or else in the Star Chamber, afterwards became incorporated with it. Though part of the general law of England, it is distinguished by a separate name, because it applies to particular subjects, principles more or less different from those which the Common Law recognises in other matters, and also because these principles were engrafted into the English municipal system by gradual adoption from the *lex mercatoria*, or general body of European usages, in

¹ See XIII C.W.N. CXLVII. Vol. I., 62. See too Blackburn,

² Stephen's Commentaries, Ed., p. 317.

matters relating to commerce. There are three distinct stages in the history of the Law Merchant, the first ending in the time of Coke, during which it was a special law administered in special Courts for the purpose of settling the disputes of a special class, *i.e.* of merchants, who were subject to peculiar duties and enjoyed peculiar privileges. In the second stage, continuing until the time of Lord Mansfield, it was a body of customs to be proved in case of doubt as facts, and binding only on mercantile persons. During the third stage, it has become a collection of customs incorporated into the general law, and binding on all, whether merchants or not.

The sources of the Law Merchant were :—

- (1) Collections of maritime usages and customs drawn up for the use of merchants and lawyers, such as the laws of Oleron and Wisbey.
- (2) Market law, which began with the great fairs in the middle ages, held in the great commercial centres to which merchants of all nations resorted, and was administered in Staple Courts. There were also special Courts for the trial of mercantile cases in Italy, France, Spain and Germany. The English Admiralty Court administered Mercantile Law in early times and the Maritime Law which it still administers as part of our Municipal law is a branch of the *lex mercatoria*.

Another source of the Law Merchant was the books of authority (mostly foreign), written in the fourteenth and fifteenth centuries, and the English Malins and Molloy. The direct survivals of it in the present law are the principle of non-survivorship in partnerships, the right of suing on negotiable instruments, and the right to trade marks.

§ 6.
Law
Maritime.

The general Law Maritime¹ as it is administered in England by Courts of Admiralty, "must be taken to describe a certain part of the law of England not derived from any specially English custom or legislation, but which so far back as it can be traced in our law, possessed legal sanction over all or most of those tracts which were included within the horizon of our early lawyers."² Willes J. referred to it as the general maritime law as administered in England, or to avoid periphrasis, the law of England.³

§ 7.
Common
Law and
Law
Merchant.

The Common Law and the Law Merchant may be compared together as to their origin.⁴ The Common Law of England is the body of national custom which the people have found out for themselves to be just, salutary and convenient, and which they have moulded from time to time to meet the changing conditions of society. It is exactly so with the body of mercantile customs, which the Law has sanctioned under the name of the Law Merchant. It represents the usages which the mercantile community have adopted for themselves : it is of all the laws in the world, the most completely the offspring of usage and convenience and the least fettered by legislative restrictions.

§ 8.
Law
Merchant
not stereo-
typed.

It is also to be remembered that the Law Merchant is not fixed or stereotyped : it has not yet been arrested in its growth by being moulded into a code : it is in the words of Cockburn C J. in *Goodwin v. Roberts*⁵ "capable of being expanded and enlarged so as to meet the wants and requirements of trade in the varying circumstances of commerce." Since the recent decisions in England

¹ Westlake Private International Law.

² *Lloyd v. Guibert*, L. R. I. Q. B. 125. See Laws of England, Vol. I. p 62.

³ *The Goclano and Maria*, 7

P.D. p. 143.

⁴ See 15 Law Quarterly pp. 180 245.

⁵ *Edelstein v. Schuler*, (1902)

2 K. B. 144.

⁶ 44 L.J. Ex. 162.

following *Goodwin v. Roberts*,¹ the former distinction which was considered to exist between a particular usage of trade and the general custom of merchants which, as it was said, is the universal established law of the land, which is to be collected from decisions, legal principles and analogies, not from evidence in pais, and the knowledge of which resides in the heart of the Judges, no longer holds. It is clear from these judgments that it is still possible for a new trade usage to become so general as to be entitled to recognition as part of the Law Merchant.² In these cases the question was whether instruments can become negotiable by modern usage. It was admitted that negotiability is an incident which can only attach to an instrument by virtue of a statute or under the Law Merchant. The controversy turned on whether this must be the ancient law merchant, or whether modern usage can suffice. It was held that modern usage is sufficient, the question turns on the generality and not on the age of the usage.

§ 8.

It is to this body of laws which have to some extent been codified in England, that the Privy Council referred in the cases cited above.

So far the law applicable in the absence of any express enactment has been dealt with, but the greater part of the Mercantile Law, as far as India is concerned, has been codified under the powers granted to the Indian Legislatures referred to above, the basis of the codes being the law of England stripped of its local peculiarities, and modified with regard to the conditions, institutions and climate of India, and the character, religions and usages of the population, and where the law has been codified it is of little avail to enquire what is the law apart from such codification, but it is the code itself that must be looked

§ 9.
Codification in India.

¹ See Smith's L.C. 11th Ed. 554.

² See Law Quarterly Vol. 15 pp. 130, 245.

§ 9. to as a guide in the matter.¹ The object of codifying a particular branch of the law is that on any point, specifically dealt with, the law should henceforth be ascertained by interpreting the language used in that enactment, instead of, as before, searching in the authorities to discover what may be the law as laid down in prior decisions.² Some subjects have not yet been dealt with, namely, the law relating to contracts of Carriage, of Insurance, of Respondentia and Bottomry, as to the interpretation of contracts, and as to mercantile securities generally. Moreover the codes themselves are not and do not purport to be exhaustive, the result being that frequent reference has to be made in deciding Indian cases to the English law as explained above.

¹ *Burn & Co. v. MacDonald*, *Kamalabasini Debi*, 28 I. A. 18; 36 C. p. 361. See § 93.

² *Morendro N. Sircar v.*

CHAPTER II.

Conflict of Laws.

§ 10.
**What law
governs
contracts.**

In commercial transactions between persons residing in different countries, many circumstances may be required to be taken into consideration before it can be clearly ascertained what is the true rule by which the validity, obligations and interpretation of contracts are to be governed. To make a contract valid it is a universal principle, admitted by the whole world, that it should be made by parties capable to contract ; that it should be upon a sufficient consideration ; that it should be lawful in its nature ; and that it should be in its terms reasonably certain. But upon some of these points there is a diversity in the positive and customary laws of different nations. Persons capable in one country, are incapable by the laws of another : considerations good in one country are insufficient or invalid in another : the public policy of one country permits or favours certain agreements which are prohibited in another : the forms prescribed by the law in one country to ensure validity and obligation of contract are unknown to another : and the rights acknowledged by one country are not commensurate with those obtaining in another.

A person sometimes contracts in one country, is domiciled in another, and is to pay in a third : and the property which is the subject-matter of the contract may be situated in a fourth ; and each of these countries may have different, and even opposite laws, affecting the subject-matter. What is to be done in this conflict of law ? What law is to regulate the contract either to determine the right or the remedies or the defences growing out of it, or the consequences flowing from it ? What law is to interpret its terms, and ascertain the nature, character and extent of its stipulations ? ¹

¹ Story's Conflict of Law, s. 282.

§ 11.
Rule
applied in
India.

Onus of
proving
foreign law
different.

The expression "conflict of law" is somewhat misleading: the fact being that it is part of the law of India¹ that contracts must be governed by the proper law applicable to them and such law may or may not be the Indian law. In the case of a foreign contract it is the law in India that the Courts should decide the case according to the law which governs such contract: the difficulty is to select that law and sometimes to ascertain what that law, when selected, provides; but foreign law, if applicable, is a question of fact and must be proved by some competent person; it is not sufficient to produce Codes, or text books, for the Court to consider,² and it lies on him who asserts it to prove that the law of a foreign State differs from ours, and in absence of such proof it must be held that no difference exists except possibly so far as the law here rests on specific acts of the legislature.³

§ 12.
Capacity of
a person to
contract.

Section 11 of the Contract Act enacts that every person is competent to contract who is of the age of majority according to the law to which he is subject,⁴ and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.⁵

The same rule that the law of domicile and not of the party's political nationality governs capacity to contract is generally adopted in England,⁶ but the question is open to some doubt and there is authority for the proposition that capacity to enter into ordinary mercantile contracts is

¹ That is, the question is governed by the *lex fori*, *Langton v. Hughes*, I. M. & S. 598.

² See Evidence Act, ss. 38, 45.

³ *Raghunathjee v. Varjewandas*, (1906) 8 Bom. L. R. 525, 558; 30 B. 578. *Lloyd v. Guibert*, L.R. Q.B. 115. See Neg. Instruments Act, s. 137; Evidence Act, s. 114; Westlake, 3rd Ed. 364.

⁴ *Kashiba v. Sripat*, (1894) 19 B. 697 (infant); *Sirdar Girdval Singh v. Rajah of Farikote*, (1894) 4 M L J. 267 P.C.; *Rohilkhand and Kuamun Bank v. Row*, (1885) 7 A. 490, and as to Negotiable Instruments see Neg. Ins. Act, s. 134.

⁵ See Oudh Land Revenue Act 1876; *Lachmi Narain v. Fatch*, (1902) 25 A. 195.

⁶ Westlake, 4th Ed. 41; Wheaton 4th Ed. 227; Story, s. 241.

governed by the *lex loci contractus*.¹ The authorities are conflicting.²

The essential validity of a contract, (as distinguished from its formal validity)³ as well as its interpretation and effect⁴ and the rights and obligations of the parties to it⁵ are governed, with certain exceptions, by the law by which the parties have agreed, or intended, or may fairly be presumed to have intended to be bound.⁶ This law is generally known as the proper law of the contract.⁷ But it is not easy to ascertain what is the proper law.

§ 13.
Validity of contracts.

Proper Law.

No difficulty arises if the parties expressly stipulate in their contract that it is to be governed by a particular

¹ Laws of England, Vol. VI, 232; Dicey, 2nd Ed. 538; Foote, 3rd Ed. 71, 350; Tudor's M.C., 3rd Ed. 629.

² For the *lex loci contractus* *Male v. Roberts*, (1844) 8 Esp. 168; *Simonin v. Mallac* (1860) 2 Sw. & Tr. 67, 77; *Sottomayor v. De Barros*, (1877) 3 P. D. 1 C. A.; *Ogden v. Ogden*, (1908) P. 44, 59 C. A.; *Stephens v. McFarland* (1845) 8 Ir. Eq. 444; *Re D'Orleans*, (1859) 1 S. & T. 258. *In the goods of Meatyard*, (1903) P. p. 129. For the *lex domicilii*; *Re da Cunha*, (1828) 1 Hag. Ecc. 237; *Udny v. Udny*, (1869) L.R. 1 Sc. Ap. 457; *Cooper v. Cooper*, (1888) 18 Ap. Ca. 99; *Guepratte v. Young*, (1851) 4 De G. & Sm. 217; *Re Cook's Trusts*, (1887) 56 L. J. Ch. 637; *Abd-ul-messeli v. Farra*, (1888) 18 Ap. C. 431.

³ *Re Missouri S.S. Co.*, (1889) 42 Ch D. 321 C.A., bill of lading, *Hamlyn v. Talisher*, (1894) A. C. 202 (Submission to Award); *Spurrier v. La Cloche*, (1902) A. C. 446; *South African Breweries v. King*, (1899) 2 Ch. 173; (1900) 1 Ch. 273 C.A. (Restraint of Trade).

⁴ *Chatenay v. Brazilian S.T. Co.*,

(1891) 1 Q.B. 79 C.A. (Construction of Foreign Power of Attorney); *Re Fitzgerald*. (1904) 1 Ch. 573 C. A.

⁵ *P & O. Co. v. Shand*, (1865) 3 Moo. P.C. C. N. S. 272 (Liability of Carriers for through carriage); *Chamberlain v. Napier*, (1880) 15 Ch. D 614. (Execution of Trusts); *Jacobs v. Credit Lyonnais*, (1884) 12 Q. B. D. 589 C. A.; *Re Missouri S.S. Co.*, (1889) 42 Ch. D. 321 C.A.; *Chatenay v. Brazilian*; S. T. C. (1891) 1 Q.B. 79 C. A.; *Spurrier v. Le Cloche*, (1902) A. C. 446 (Submission to Arbitration); but see *Palasuappa v. Periakarappam*, (1893) 17 M. 262, where it was held that the question whether judgment could be given upon the consideration for a document inoperative by the *lex loci contractus* depended on the procedure of the *lex fori*.

⁶ *The Nina* (1867) L.R. 2 A. & E. 44; *Greer v. Poole*, (1880) 5 Q. B. D. 272; *The Mary Thomas*, (1894) P. 108 C.A.; and see *Sitar v. Thompson*, 32 C. p. 889; *DeSouza v. Coles*, 8 M.H.C. 415.

⁷ See Dicey, 2nd p. 329, 580.

**§ 14.
Contract
may
provide.**

law.¹ But according to Dicey, parties cannot, when in fact they contract under one law, agree that the contract shall be governed by some other law. And the intention which determines the proper law is the intention of the parties actually and in fact to contract with reference to the law of a given country.² But in India the Negotiable Instruments Act recognises the right to contract as to the law to be applied³ and the weight of authority is in favour of the view that parties can incorporate foreign law into their contracts,⁴ and may confer concurrent or exclusive jurisdiction in the courts of a particular country⁵ and this, if done, is practically conclusive as to the law intended,⁶ although they cannot by their contract give a court a jurisdiction which it does not possess, as for instance to an English court to serve a writ on persons domiciled or ordinarily resident in Scotland or Ireland which is expressly provided against by law.⁷ It seems that parties cannot agree to alter the law under which they are governed, by importing into a contract some foreign system.

**§ 15.
When
contract is
silent.**

When the agreement is silent the Court must ascertain the intention of the parties from the terms and nature of the contract and from the general circumstances of the case in order to decide to what general law is it just to presume that the parties have submitted themselves,⁸ and

¹ *The Nina*, (1847) L. R. 2 A. & E. 44 (English mate agreed to be bound by Portuguese law); *The Mary Thomas*, (1894) p. 108 C.A. (English policy: General average as per foreign statement), cf. *Guepratte v. Young*, (1851) 4 De G. & Sm. 217; *Greer v. Poole*, (1880) 5 Q. B. D. 272 (Policy); *Hamlyn v. Talisker Brewery*, (1894) A.C. 202.

² Dicey, 555, 567.

³ S. 134.

⁴ *Jacobs v. Crédit Lyonnais*, (1892) 58 L.J.Q.B. 158.

⁵ *Coffin v. Adamson*, (1886) 45 L.J. Ex. 15; *Tharsis v. Soc. des Métaux*, (1897) 58 L.J.Q.B. 435.

⁶ *Royal Exchange Ins. Co. v. Sjörforsakrings*, (1902) 2 K.B. 384 C.A.; *Krichner v. Graban*, (1908) 127 L.T.J. 166.

⁷ *British Wagon Co. v. Gray*, (1896) 1 Q.B. 35.

⁸ *Lloyd v. Guibert*, (1865) L.R. 1 Q.B. 115 Ex. Ch.; *Chartered Mercantile Bank v. Netherlands India S.N. Co.*, (1883) 10 Q.B.D. 521 C.A.; cf. *Hamlyn v. Talisker*, (1894) A.C. 202; *South African Breweries v. King*, (1899) 2 Ch. 173 (full discussion); (1900) 1 Ch. 273 C.A. Westlake, 4th Ed., p. 280, 281 takes a modified view, Dicey 2nd Ed. p. 814-21; *Jacobs v. Crédit Lyonnais*, (1884) 12 Q.B.D. 589 C.A. (Sale of Goods).

that will be the law governing the substance of the contract.¹ There are certain presumptions which enable the Courts in the absence of other circumstances to arrive at a conclusion on this difficult question. Prima facie the proper law is presumed to be the *lex loci contractus*,² and this rule has been adopted in India³ where it was said that a contract made in England must be decided by English law. According to American law where a contract is made by an offer sent by post to another country where it is accepted, the contract of sale is made in that other country.⁴ Dicey, however, considers that in such a case the question is in doubt. But in India a contract has been held to be made where it is accepted.⁵ This presumption applies with special force when the contract is to be performed wholly in the country where it is made or may be performed anywhere, but it may apply to a contract partly or even wholly to be performed in another country.⁶ But other circumstances are generally present, and it is impossible to lay down any single and definite rule.⁷ So in the case⁸ of a contract made in England but to be performed in another country where it is void as being in restraint of trade, in order to ascertain what was the proper law of the contract, Kekewich, J., considered the subject-matter of the contract, the place where it was

§ 15.

Prima facie
lex loci
contractus.

¹ *British S. Africa Co. v. De Beers*, (1910) 1 Ch. 354, 2 Ch. 502. (1902) A.C. 446; *Risdon v. Furness*, (1905) 1 K. B. 304.

² *Arnott v. Redfern*, (1825) 2 C. & P. 88.; *Scott v. Pilkington*, (1862) 2 B. & S. 11, 31 L.J. Q.B. 81; *P. & O. v. Shand*. (1865) 3 Moo. P.C.N.S. 272 p. 290; *Lloyd v. Guibert* (1865) L. R. 1 Q. B. 115, 122; *Jacobs v. Crédit Lyonnais*, (1884) 12 Q.B.D. 589 C.A. p 600; *Re Missouri S.S. Co.*, (1889) 42 Ch. D. 321 C. A.; *Gibbs v. Société Industrielle*, (1890) 25 Q. B. D. 399 C. A.; *Chatenay v. Brazilian S.T. Co.*, (1891) 1 Q.B. 79 C. A.; *Spurrier v. La Oloche*,

³ *Bapurji Sorabji v. The Clan Line*, (1911) 34 B. 640 C.A.

⁴ *Frank v. Hoey*, 128 Mass. 263.

⁵ 27 M. p. 359; *Sitaram v. Thompson*, 32 C. 884, 27 B. 9.

⁶ Dicey, 569; Story, ss. 242, 280.

⁷ *Jacobs v. Crédit Lyonnais*, (1884) 12 Q. B. D. 589 p. 601.

⁸ *South African Breweries v. King*, (1899) 2 Ch. 173; (1900) 1 Ch. 273 C. A. and see *Oakes v. Jackson*, (1876) 1 M. 134.

§ 15. made the contracting parties, and the things to be done in order to ascertain the intention of the parties, and cited Westlake, section 218, page 258, to the effect that preference has been given to the country with which the transaction showed the most real connection and not to the law of the place where the contract was made. The Appeal Court held that as Johannesburg was the primary place to which the contract referred, African law applied. As regards negotiable instruments,¹ the India law provides that when a promissory note or bill of exchange or cheque is made payable in a different place from that in which it is made or endorsed, the law of the place where it is made payable, determines what constitutes dishonour, and what notice of dishonour is sufficient.² This is the same as the English law.³

§ 16. **Where contract wholly to be performed in one country.** A contract made in one country but wholly to be performed in another is in absence of other considerations to be regarded as intended to be governed by the *lex loci solutionis*, i.e. the law of the place where it is to be performed.⁴ In India this view was not followed in a Madras case⁵ where however the contract though for employment in India was partly performed in England. The learned Judge however laid it down that the *lex loci contractus* applied. So where goods were sold in England and

¹ Neg. Instr. Act s. 135, cf. English Act, s. 72 (3).

² *Gibbs v. Fremont*, 9 Exh. 31, Byles 389.

³ *Rouquette v. Overmann*, (1875) L.R. 10 Q.B. 525, and *Horne v. Rouquette*, (1878) 3 Q.B. D. 514 C.A.

⁴ *Chatenay's case*, (1891) 1 Q.B. 79 C.A. p. 82, cf. *Gibbs v. Société Industrielle*, (1890) 25 Q.B. D. 399 C.A., but see *Hamlyn v. Talisker*, (1894) A.C. 202, 207-208, where it was said not

to be conclusive. See *Chamberlain v. Napier*, (1880) 15 Ch. D. 614, trusts of English reality executed in Scotland, but there the form was English, *Hansen v. Dixon*; (1906) 96 L.T. 32 contract to marry entered into in Denmark—married home intended to be in England; see *Lloyd v. Guibert*, (1865) L.R. 1 Q.B. 115, 122; *Cox v. Governors of Bishop Cotton's School*, (1874) Pung. Rec. No. 85.

⁵ *Oakes v. Jackson*, (1876) 1 M. 184 O.C.

stopped in transit in Bombay, it was held that the English law applied.¹ § 16.

This, however, conflicts with an English ruling that where goods are to be delivered abroad, the contract must be performed according to the law of the place of delivery.²

The Negotiable Instruments Act also provides³ that in the absence of a contract to the contrary the liability of the maker or drawer of a foreign promissory note, bill of exchange or cheque, is regulated in all essential matters by the law of the place where he made the instrument⁴ (which is also as far as he is concerned the *lex loci solutionis*) and the respective liabilities of the acceptor and endorsee by the law of the place where the instrument is made payable⁵ and this points to the general rule being that the *lex loci solutionis* is the proper law.

It is material to consider whether the contract or any part of it is void or invalid under one competing system of law though good under another, for it will generally be presumed that the parties contracted with reference to the law which would best effectuate their intentions,⁶ though a partial invalidity under one of the laws is not conclusive.⁷ § 17. Where contract invalid by one law.

This rule is confirmed in India by the Negotiable Instruments Act,⁸ under which if a Negotiable Instrument is made, drawn or accepted or endorsed out of British

¹ *Bapurji Sorabji v. The Clan Line*, (1911) 34 B. 640 C. A.

² *Rosseter v. Cahman*, 22 L. J. Ex. 128.

³ S.134 English Act s. 72, (1, 2).

⁴ This is the English rule according to Chalmers on Bills, 5th Ed. 238, but see *Robinson v. Bland*, (1760) 2 B. 1077; *Moulis v. Owen*, (1907) 1 K.B. 748 C.A., when being payable in England, English law was applied.

⁵ In England the endorsee apparently is liable by the law of the place of endorsement, *Allen v.*

Kemble, (1848) 6 Moo. P. C. 321; *Horne v. Rouquette*, L. R. 3 Q. B. D.514; Chalmers on Bills, 5th Ed. 238.

⁶ *Re Missouri S. S. Co.*, (1889) 42 Ch. D. 321 & C. A. 341; *P. & O. v. Shand*, (1865) 3 Moo. P.C.C. N. S. 272; *Hamlyn v. Talisker*, (1894) A. C. 202.

⁷ *South African Breweries v. King*, (1889) 2 Ch. 173, 181. For bills of lading see § 18.

⁸ S. 136, cf. English Act 72 (1) b.

§ 17. India but in accordance with the law of British India, the circumstance that any agreement evidenced by such instrument is invalid according to the law of the country wherein it was entered into does not invalidate any subsequent acceptance or endorsement made thereon in British India.

Nationality. The nationality of the parties has little or no bearing on the question¹; and not much weight is to be attached to their place of residence,² except perhaps in purely mercantile contracts.³

Form of Contract. The form of the contract⁴ the fact that it contains phrases peculiar to one system of law,⁵ as well as the language⁶ in which it is expressed, are relevant, though the last is certainly not conclusive.⁷

A stipulation that the parties agree to be bound in all things by the jurisdiction and decision of the Courts of a particular country is practically conclusive.⁸

§ 18. Insurance Policies. There are certain presumptions in particular cases. An English policy of insurance is governed by English law unless the underwriters stipulate to the contrary, the nationality of the ship and goods insured is immaterial.⁹

Affreightment. A contract of affreightment will be governed by the law

¹ *Re Missouri S. S. Co.*, 42 Ch. D. p. 329.

² *South African Breweries v. King*, (1889) 2 Ch. 173.

³ *Chartered Bank of India v. Netherlands*, (1883) 10 Q.B.D. 521 C.A.; *Jacobs v. Crédit Lyonnais*, (1884) 12 Q. B. D. 589 C. A.

⁴ *Chamberlain v. Napier*, (1880) 15 Ch. D. 614 (marriage settlement); *Re Barnard*, (1887) 56 L. T. 9 (same); *The Leon* (1883) 8 P. D. 121 C.A.; (Spanish articles entered into by English sailor); *Chartered Mercantile Bank of India v. Netherlands*, (1883) 10 Q.B.D. 521 C.A. (English bill of

lading); *Re Missouri S.S. Co.*, (1899) 42 Ch. D. 321 C. A. (same).

⁵ *The Leon*, *supra*; *The Industries*, (1894) P. 58 C.A., ("Queen's enemies").

⁶ *Chatenay's case*, (1891) 1 Q. B. 79 C. A.

⁷ *The Industrie supra*.

⁸ *Royal Exchange Ins. Co. v. Sjörforsakrings*, (1902) 2 K.B. 384 C.A. p. 394; *Kirchner v. Grubban* (1908) 127 L. T. Jo. 166. and see *ante* § 14 and the Neg. Ins. Act, s. 184.

⁹ *Greer v. Poole*, (1880) 5 Q.B.D. 272; cf. *Spurrier v. La Cloche*.

of the ship's flag,¹ unless it is clear that it was intended to adopt some other law.² The owner of a cargo in the absence of a stipulation to the contrary ships it to be dealt with according to the law of the ship's flag. Thus, a bottomry bond is governed by the law of the ship's flag.³ A general average adjustment is governed by the law of the place where the voyage properly and actually terminates.⁴

§ 18.

Cargo.

General average.

A bill of lading, containing an exception valid in England, invalid in America, will in case of goods shipped from America to England be governed by the law of the ship's flag.⁵

Bill of lading.

A through contract of carriage is governed by the *lex loci contractus*, if the circumstances do not show a contrary intent.⁶ And when the master of a ship sold the cargo in Norway under circumstances which would not have given a good title in England, but gave a valid title by the law of Norway, it was held that he could give a good title although the goods subsequently came to England.⁷

Contracts of Carriage.

Sales by Masters of ships.

As a general rule the discharge of a contract if valid by the law of the place of performance is valid everywhere;⁸ if not so valid, it cannot be pleaded elsewhere.⁹

Performance.

¹ *Lloyd v. Guibert*, (1868) L. R. 1 Q. B. 115; *The August*, (1891) P. 828.

² *The Patria*, (1871) L. R. 3 A. & E. 436; *The San Roman*, (1872) L. R. 3 A. & E. 583; *The Industrie*, (1894) P. 158 C. A.

³ *Droege v. Stuart*, (1869) L. R. 2 P. C. 505; *The Gaetano*, (1882) 7 P. D. 137 C. A.; cf. *The Stetson*, (1889) 14 P. D. 142.

⁴ *Hill v. Wilson*, (1879) 4 C. P. D. 329; *Atwood v. Sellar*, (1880) 5 Q. B. D. 284, 289, C. A. cf. *Harris v. Scaramanga*, (1872) L. R. 7 C. P. 481; *The Mary Thomas*, (1894) P. 108 C. A.

⁵ *Re Missouri S. S. Co.*, (1889) 4 Ch. D. 821 C. A. cf. *Chamberlain*

v. Napier, (1880) 15 Ch. D. 414 (contract of affreightment); *Lloyd v. Guibert*, (1865) L. R. 1 Q. B. 115.

⁶ *P. & O. v. Shand*, (1865) 3 Moo. P. C. C. N. S. 272; *Cohen v. S. E. R.*, (1877) 2 Ex. D. 253 C. A. See Dicey, 2nd Ed. p. 580 as to incidents on the transit, p. 581.

⁷ *Cammell v. Sewell*, (1860) 29 L. J. Ex. 350; cf. *Alcock v. Smith*, (1892) 1 Ch. 288 C. A. See Dicey 530. Westlake, 3rd Ed. 101.

⁸ *Ellis v. M'Henry*, L. R. 6 C. P. 238; *Phillips v. Allan*, (1828) 8 B. and C. 477.

⁹ *Gibbs v. Societe Industrielle*, 25 Q. B. D. 399.

§ 19.
Contracts
governed
by more
than one
law.

§ 20.
Indian
Cases.

A contract may be governed by two different laws where the subject matter is severable and the intention of the parties that two laws should apply clearly appears.¹

In India the Privy Council followed *Lloyd v. Guibert*,² holding that the rights of the parties must be judged of by that law which they intended or rather by which they may justly be presumed to have bound themselves; and accordingly construed the contract as being made relying on the then current view of the law, although it had subsequently been reversed. This is not of course a case of international law but shows the same principle.³

Lex loci
contractus.

The rule laid down in India has been that the *lex loci contractus* governs the validity of a contract made abroad.⁴ This rule was laid down broadly in Madras in 1876⁵ though there the contract was to be performed almost entirely in India. In 1881 the Privy Council⁶ laid down the same rule, but in that case the contract of suretyship was to stand security for the performance of a contract in the foreign state where the contract was made and the agreement was that the parties should be liable there. The same rule was followed in a later Madras case, but the case is badly reported and the decision seems apart from the statement of this rule to be wrong.⁷ Jenkins, C.J., in the case of a gift considered that its validity depended on the law of the place where it was made.⁸ The same rule has been laid down in Bombay.⁹

¹ *Chamberlain v. Napier*, (1880) 15 Ch. 614; *Hamlyn v. Talisker*, (1894) A.C. 202.

² B. & S. 100, 133 (1865) L. R. 1. Q. B. 115.

³ *Abdul Aziz Khan v. Appayasami*, (1903) 6 Bom. L. R. 7, P. C.; 31 I. A. 1; 27 M. 131.

⁴ *Her Highness Ruchmaboye v. Lulloobhoy*, (1851) 8 Moo. I. A. 264, 266.

⁵ *Oakes v. Jackson*, (1876) 1 M. 134 O. C.

⁶ *Sirdar Sujan Singh v. Ganga Ram*, (1881) 8 I. A. 58 P. C.

⁷ *Palaniappa v. Pariakappa*, (1893) 17 M. 252.

⁸ *Raghunath v. Varjivandas*, (1906) 30 B. p. 586, 588 A. C. 8 Bom. L. R. 525, as to the law governing real property in India see *The Secretary of State v. Charlesworth*, (1900) 26 B. 1. (P. C.) where the position of consular property is discussed.

⁹ *Bapurji Sorabji v. The Clan Line*, (1911) 84 B. 640 C.A.

In effect the general rule has been laid down broadly, but except in the first case no exceptional circumstances have had to be considered. In deciding what law applies no notice has been taken of the Negotiable Instruments Act where the rules as to the international law applicable to negotiable instruments are laid down. There does not seem to be any broad distinction between such rules and those applicable to other mercantile transactions either on principle or according to the practice of other countries although the Contract Act section 11 and section 134 of the Negotiable Instruments Act do not enact the same rule as to the law governing capacity to contract. The provisions there enacted do not follow any fixed principle. The right of the parties to contract on the subject is recognised in section 134. The *lex loci contractus* is adapted in some cases, see section 134; but generally the *lex loci solutionis* is preferred, see sections 134, 135 and 136, though in all such cases the entire performance is to be made in the country of performance. The Privy Council in an Indian appeal held that where a contract of suretyship was made in Bhawalpur, the parties must be considered to have made it according to the liabilities that would be incurred there. The suit was brought in British India to recover a sum which the surety was compelled to pay owing to his standing security for an advance made to contractors who were to deliver wood in Bhawalpur. Their Lordships considered that the law of British India was not to be looked at. They must see what was in the contemplation of the parties when they entered into the contract of Bhawalpur.¹

§ 20.

Negotiable
Instruments
Act.

The general rule that the validity of the contract is governed by the proper law of the contract admits of several exceptions.² A distinction is to be drawn between contracts which for some reason or other have no legal

§ 21.

Legality of
Contracts.

¹ *Sirdar Sujan Singh v. Gunga Ram*, (1881) 8 I A. 58, 8 C. 337.

² See Dicey, 2nd Ed. 814, 821; Foote, 3rd Ed. 385; see *Oakes v. Jackson*, (1876) 1 M. 184 O.C.

§ 21. effect as, for example, in England or India a contract unsupported by consideration,¹ and contracts which are expressly forbidden or are not recognised as valid because of some rule of public policy adopted by Courts. In the first class, apparently the contract is governed by its proper law.² The second class involves different considerations.

Illegal by
proper law.

A contract illegal by its proper law will not be enforced in India.³ This is probably so even if it merely violates the revenue law of the country by whose law it is governed,⁴ though foreign revenue laws are generally disregarded in England,⁵ though the English Courts, it seems, will respect the revenue laws of British colonies.⁶

Illegal by
law of
country
where to be
performed.

So, too, if the performance of a contract is unlawful by the law of the country where the contract is to be performed⁷ or the contract forms part of a transaction which is unlawful by the law of the country where the transaction is to take place,⁸ it will not be enforced. In India it has been said, in respect of negotiable instrument that⁹ as regards foreign stamp law, the Indian like the English Courts do not regard the revenue laws of another country; except perhaps where a bill issued abroad is

¹ Cf. a negotiable instrument invalid where made; *see* Neg. Ins. Act, s. 184.

² *Re Fitzgerald*, (1904) 1 Ch. 578 C.A. it may however be unprovable, *Lecroux v. Brown*.

³ Cf. *Westlake* 4th Ed. 282; *Herij v. Reira*, (1840) 11 Sim. 318.

⁴ *Laws of England*, Vol VI, 243, and *Wharton*, s. 485.

⁵ *Planché v. Fletcher*, (1779) 1 Doug. (K.B.) 190; *James v. Catherwood*, (1823) 3 D. & Ry. (K.B.) 190; cf. *Sharp v. Taylor*, (1848) 2 Ph. 801; *Lightfoot v. Tenant*, (1796) 1 B. & P. 552; *Bazett v. Meyer*, (1814) 5 Taunt. 824;

Dicey 561; *Leake on Contract*, 3rd Ed. 66.

⁶ *Laws of England*, Vol. VI, 244, and *Dicey*, 2nd 553-555.

⁷ *Moulis v. Owen*, (1907) 1 K.B. 746 C.A.; *Grill v. Levy*, (1864) 16 C.B. N.S. 73 (*Champertous*).

⁸ *Beggs v. Lawrence*, (1789) 3 T.R. 454 (smuggling into England); *Clujas v. Penaluna*, (1791) 4 T.R. 444, but quere of this applies if the parts are servable, *see para.* 111; *Wagmell v. Reed*, (1794) 5 T.R. 599; 2 R.R. 675.

⁹ *Stokes' Anglo-Indian Codes*, VII p. 719, citing *Byles* 386, 390.

absolutely void because it is not stamped in accordance with the law of the place of issue.¹

Contracts whether lawful by their proper law or not which are illegal by the lex fori will clearly not be enforceable,² nor will Indian Courts enforce contracts if they conflict with the ideas of public policy³ or morality⁴ prevalent in this country or if any part of them is offends in these ways,⁵ nor if they are opposed to the interests of State.⁶ In England, however, the law is not well settled, for whereas a contract to sell slaves was upheld as being legal by its proper law,⁷ gaming transactions, though valid by their proper law, have been held to be unenforceable.⁸ But a contract though invalid by the lex fori but not illegal or otherwise objectionable, will be enforced.⁹ The point was discussed in Madras¹⁰ with reference to a contract of employment entered into by the defendants in England

§ 22.
Illegal by
lex fori.

Invalid by
lex fori.

¹ *Ibid.*, citing Story 2nd Ed. *Bristowe v. Sequeville*, (1850) 5 Ex. 275; Westlake, s. 174, sed contra Byles on Bills, 15th Ed. 356.

² Dicey, 558 2nd Ed. 549; *In re Missouri Steamship Co.*, (1889) 42 Ch. D. 321, 334 C.A.

³ *Hope v. Hope*, (1857) 8 De G.M. & G. 781 C.A. (collusive divorce); *Hamlyn v. Talisker*, (1894) A.C. 209, 214; *Grell v. Levy*, (1864) 16 C.B.N.S. 73 (maintenance); *Roussillon v. R.*, (1880) 14 Ch. D. 351 (restraint of trade); *Kaufman v. Gerson*, (1904) 1 K.B. 591 C.A. (moral coercion or as to a gaming contract); *Subraya v. Subraya*, 4 M.H.C. 14; see *Moulis v. Owen*, (1907) K.B. 746, 756; cf. *Hyams v. Stuart*, (1908) 2 K.B. 696 C. A.

⁴ *Robinson v. Bland*, (1760) 2 Burr. 1077, 1084 (prostitute's

wages); *Kaufman v. Gerson*, (1904) 1 K.B. 591 C.A.

⁵ *Hope v. Hope*, supra: but quaere if this applies when the illegal part is severable, see para. 111

⁶ *De Wütz v. Hendrichs*, (1824) 2 Bom. 314 (loans to assist in war against a friendly nation); see for Indian cases, *Oakes v. Jackson*, (1876) 1 M. 184 O. C. (restraint of trade).

⁷ *Santos v. Illidge*, (1860) 29 L.J. C.P. 348.

⁸ *Kaufman v. Gerson*, (1904) 1 K.B. 591; see Dicey 727.

⁹ *Saxby v. Fulton*, (1908) 99, L.T. 92; (1909) 2 K.B. 208 (money lent for gaming) *Re Fitzgerald*, (1904) 1 Ch. 573 C.A.; *Moulis v. Owen*, (1907) 1 K.B. 746 C. A.

¹⁰ *Oakes v. Jackson*, (1876) 1 M. 134 O.C.; see too *Vythelingam v. Setharam*, 23 M. 449, 454.

§22 with the plaintiffs, a firm in Madras, to go to Madras and serve as tailor's assistants for five years and afterwards not to trade within 800 miles of Madras and to return to England if requested to do so. The contract was signed in England by the defendants and one partner of the plaintiffs, and the defendants received an advance there and set out for India. It was argued that the *lex loci contractus* must govern the case citing the *P. & O. Co. v. Shand*.¹ The defendants argued that as the contract was to be performed in India the Indian law applied.² It was held that the contract was made in England, and that there is no question that as a general rule the *lex loci contractus* governs the validity of a contract. But it is a rule subject to some exceptions, one of which is that a contract made in one country for the purpose contravening the laws of another country³ within that other country cannot be enforced in the Courts of that other country. The Court added, it is not necessary that contract should be immoral⁴ by the *lex fori*. For the English Courts will not enforce a contract to deliver smuggled goods in England.⁵ The same principle was held to apply to contracts in restraint of trade, as being against the policy of the law in India.⁶

§ 23.
Unlawful by
law of coun-
try where
made.

A contract whether lawful by its proper law or not is invalid if the making thereof is unlawful by the law of the country where it is made.⁷ This exception though sound on principle, does not rest on an unassail-

¹ 8 Moo. P.C.C.N.S. 272, 290, cf. *Trimbey v. Vignier*, 1 Bing. N.C. 151; *Bradlaugh v. De Rin* L.R. 5 C.P. 477.

² Citing Story s. 280, Tudor's L.C. on M.L. 2nd Ed. 263.

³ The case falls under the rule stated in § 22.

⁴ Cf. *Robinson v. Bland*, 2 Burr. 1084 (prostitute suing for her hire).

⁵ *Hilman v. Johnson*, Cowper, 341; *Waymell v. Reed*, 5 T. R. 599.

⁶ See Negotiable Instruments Act, s. 136.

⁷ *In re Missouri S.S. Co.*, (1889) 42 Ch. C. p. 336 C. A. Dicey, p. 559; Foote, pp. 369, 370.

able foundation of authority.¹ It does not apply to cases where it is the performance and not the making itself which is unlawful,² or where at any rate in the case of negotiable instruments, it is merely invalid for want of some formality³ if it conforms with the requirements of the *lex fori*.

§ 23.

The assignability of a contract and the effect of the assignment as against the debtor are governed by the proper law of the contract.⁴ But in England the validity of the assignment itself depends in case of a debt represented by a document of title or otherwise, such as a negotiable instrument⁵ or a policy of insurance, on the law of the place where the assignment takes place,⁶ and in the case of a bare chose in action on the law of the forum for recovery of the debt, which will usually be the place where the debtor resides.⁷ But both these rules are subject to any rules of procedure with regard to the parties to an action on the assignment imposed by the *lex fori*.⁸ In India when a judgment was obtained in Mauritius and assigned to the plaintiff in India, the Madras High Court held that it was a question of first impression. It was held that the trend of judicial

§ 24.
Assignability of a contract.

Assignment of a debt.

¹ Dicey, p. 560.

² Wharton, ss. 486, 487; Dicey, 560.

³ See Neg. Ins. Act, s. 136.

⁴ Westlake, 4th Ed. 196, 301; Dicey, 2nd, p. 523; Foote, 3rd, 259; Laws of England, vol. VI 245.

⁵ In India the rule was altered by the Negotiable Instruments Act, s. 134, and the law of the place where the instrument is made payable applies; quære will this principle be applied in cases of other assignments: see *Vythelingam v. Setharam*, (1900) 23 M. 449, set out *supra*.

⁶ *Alcock v. Smith*, (1892) 1 Ch. 23, S.A.; *Embiricos v. Anglo-Austrian*

Bank, (1905) 1 K. B. 677 C. A. English Bills of Exchange Act, (1882) s. 72; *Lee v. Abdy*, (1886), 17 Q.B.D. 309 (policy of insurance); see *Kelly v. Selwyn*, (1905) 2 Ch. p. 121.

⁷ *Re Queensland Mercantile Co.*, (1891) 1 Ch. 536; *Kelly v. Selwyn*, (1905) 2 Ch. 117.

⁸ See *De la Chaumettie v. Bank of England*, (1831) 2 B. & Ad. (885); see *Re Queensland Mercantile Co.*, (1891) 1 Ch. 536 (debt assigned by judicial process); *Kelly v. Selwyn*, (1905) 2 Ch. 117, 121; *Inglis v. Robertson*, (1898) A.C. 616; *Alcock v. Smith*, (1892) 1 Ch. 238 C. A.

§ 24. opinion in England was that the validity of the assignment must be regulated by the law of the *lex situs* of the debt, and the liabilities of the debtor by the law governing him and the creditor. Judgment debts are generally deemed to be incurred in the place where the judgment was passed and where they would be executed and consequently the law of that place must regulate the liabilities of the judgment debtor wherever the assignment might have been made.¹

§ 25. **Formalities** As a rule in England the form (as distinguished from the essentials of a contract) is governed by the *lex loci contractus* and a contract that does not comply with the requirements of that law is invalid.² It is doubtful whether form includes consideration.³ If it does so conform, it is valid.⁴ The reason for the rule is that compliance with such forms can be deemed as the only criterion of the intention to enter into such a contract.⁵ Upon the same principle if chattels are sold in a manner binding according to the law of the country in which they are disposed of, that disposition is valid.⁶ So in India where a bond

¹ *Vythelingam v. Setharam*, (1900) 28 M. 449; citing Dicey, rule 141 p. 538.

² *Kent v. Burgess*, (1840) 11 Sim. 361; (*Marriage in Belgium*); Dicey, 1st Ed. p. 549; Story, ss. 240-262a; *Compton v. Bearcroft*, (1769); 2 Hagg. cons. 480 (*Marriage in Scotland*); *Dalrymple v. D.*, (1811) 2 Hagg. cons. 54; *Leroux v. Brown*, (1852) 12 C. B. 801, 824; (*Contract in France*); *Brinkley v. Att-Gen.*, (1890) 15 P. D. 76 (*Marriage in Japan*).

³ Dicey, 1st Ed. p. 549 n. 6.

⁴ *Bristowe v. Sequeville*, (1850) 19 L. J. Ex. 289 (contract void for want of stamp).

⁵ *Warrender v. W.*, 9 Bligh. 111; *Westlake*, 4 p. 272; *Alves v. Hodg-*

son, (1797) 7 T. R. 241 explained in (2) *Bristowe v. Sequeville*, (1850) 5 Ex. 275; *Clegg v. Levy*, (1812) 3 Camp. 167 (stamp); *Richard v. Gould*, (1827) 1 Molloy 2 (annuity).

⁶ Tudor, 3rd Ed. p. 632; *Cammell v. Sewell*, (1860) 5 H. & N. 721 (cargo sold on being wrecked); *Imrie v. Castrique*, 8 C. B. N. S. 405, sub nomine *Castrique v. Imrie*, (1870) L.R. 4 H.L. 414, 429; *Hooper v. Gumm*, L.R. 2 Ch. App. 282.; see Dicey, p. 530, rule 140; *Liverpool Marine Co. v. Hunter*, (1867) L.R. 4 Eq. 62; *In re Queensland Co.* (1891), 1 Ch. 536; in A.C. (1892), 1 Ch. 219; *Alcock v. Smith*, (1892) 1 Ch. (C. A.) 238, 267, 268.

was executed in Poducott, and by the law of that State it was inoperative unless registered, it was held that the contract was governed by the *lex loci contractus*, and the Madras High Court refused to enforce it. The Court expressed an opinion that a suit on the consideration would be governed by the *lex fori* but as no claim had been made on that footing, dismissed the appeal. The case is of little value as the report only gives the facts mentioned above: the place of payment and the other circumstances of the case are not given.¹ But a different rule is enacted as regards Negotiable Instruments. And if such conform to the Indian law, though invalid by the *lex loci contractus* an endorsement or acceptance in British India is valid.² § 25.

If a document is void by the *lex loci contractus* for want of a stamp, it is not receivable in evidence: ³ *secus* if it is merely inadmissible in evidence for want of a stamp.⁴ Dacey suggests an exception. If the contract is made in one country but intended to operate wholly in and subject to the law of another country it may be valid even though not made in accordance with the local form if it conforms to the form required or allowed by the country where it is to operate and subject to the law of which it is made.⁵ Westlake thinks that marriage settlements are an exception to the rule stated above.⁶ Want of stamp.

¹ *Palaniappa v. Periakaruppan*, (1894) 17 M. 262.

² Negotiable Instruments Act, s. 136.

³ *Alves v. Hodgson*, (1797) 1 Term Rep 241 (prom. note).

⁴ *Brislow v. Sequeville*, (1850) 5 Ex. 275 (receipt); *Clegg v. Levy*, (1812) 3 Camp. 166 (stamp); cf. *Richard v. Gould*, (1827) 1 Millery 22 (annuity); *James v. Catherwood* (1823) 3 Dowl. & Ry. 190; but see *Wynne v. Jackson*, 2 Russ. 352, disapproved in *Westlake*, 4th, 273; *Tudor* 3rd, 641; cf.

Oakes v. Jackson, (1876) 1 M. 134 (agreement with an English stamp made in England, allowed to be stamped in India). Ex. p. *Melbourne*, L. R. 6 Ch. 64.

⁵ p. 551 2nd Ed. 543, 544; Nelson p. 257, 258; Carver, Carriage by Sea p. 212, 213; *Van Grutten v. Digby*, (1862) 31 Beav. 561, 32 L. J. Ch. 179; cf. English Bills of Exchange Act (1882) s. 72.

⁶ *Westlake*, 4th, p. 78, 274; *Van Grutten v. Digby*, (1862) 31 Beav. 561; *Watts v. Shrimpton*, 21 Beav. 97.

§ 25. Special rules are enacted as to bills of exchange in England by the Act of 1882, particularly as to the necessity of a foreign stamp.

**§ 26.
Procedure.**

A formality which is unnecessary and of no effect by the *lex loci* will have an English effect given to it in England. Where an Indian contract was executed under seal, it was treated as a speciality and not a simple debt in England.¹

According to Dicey all cases brought in England are governed as to procedure, *i.e.*, the remedies, process, evidence, limitation and set off by the *lex fori*.² Apparently this was the meaning of the ruling in Madras.³ It was laid down by the Privy Council that the *lex fori* adjudicates upon the rights and matters in litigation according to the law of the country where the rights or causes of action arose,⁴ but the Court frames its own rules for the time for appearing, for declaring, for pleading, and for taking the several steps in the cause and the forms of the several proceedings, and consequently it is within its authority to give a judgment for the plaintiff or defendant as the penalty for default, disobedience or departures from the prescribed rules. The Court could not exercise its jurisdiction effectually without such a power.⁵ The law of limitation is part of the procedure of the Court and binds foreigners seeking relief there.⁶

**Mode of
proof.**

But although the contract conforms with the *lex loci contractus* it may not be enforceable if the rules of

¹ *Alliance Bank of Simla v. Carey*, (1830) 5 C. P. D. 429.

³ *Palaniappa v. Periakarappa*, (1893) 17 M. 262.

² 4th Ed. 709; *De La Vega v. Vianna*, (1830) 1 B. & Ad. 284; 288 *Don v. Lippmann*, (1837) 5 Ch. & F. 1, 13; *Leroux v. Brown*, 12 C. B. 801; *Leake on Contract*, 5th Ed., 186.

⁴ *i.e.* *lex loci contractus*.

⁵ *Her Highness Ruckmaboye v. Lalloobhoy*, (1851) 5 Moo. I.A 284, 269.

⁶ *idem*, p. 266; *see* Limitation Act, s. 11.

procedure of the forum require it to be proved in some particular way.¹

§ 26.

This view is far from being universal abroad,² for the general rule is that mode of proof is governed by the *lex loci contractus* as the validity of a contract depends generally on its capability of proof;³ and Westlake⁴ considers that even in England where by the *lex loci contractus* entries in merchants' books are evidence, that they should be accepted in England as such, for to do so would simply amount to regarding the merchant who made the entry in his book as constituted by the *lex loci contractus* the agent of the other party empowered to reduce the contract for him into writing in a certain way. But if the *lex fori* excludes certain evidence, such exclusion being founded on a desire to prevent perjury, then the *lex fori* might claim to over-ride any contrary rule of the *lex loci*, not as being a question of procedure, but because of a reservation in favour of a stringent domestic policy, which controls all maxims of private international law. In India there is no particular form required for commercial contracts, but the mode of proof where there is writing will be governed by the Indian law.

Where an act of Parliament intended to take effect out- Exceptions.
side England (so far at least as British subjects are concerned) prescribes or permits certain formalities in connection with contracts made abroad, the English courts are bound to recognise the validity of such contracts even though they do not comply with the forms of the *lex loci contractus*.⁵

¹ *Leroux v. Brown*, (1852) 12 C. B. 801 (valid French contract unenforceable in England because of Statute of Frauds).

² Westlake, 4th Ed. p 271, Italian Code Prelim. art. 10.

³ Savings Syst. s. 361.

⁴ 4th Ed. 272.

⁵ Foreign Marriage Act (1891) 54 and 55 Vict. 74; though foreign Courts need not recognise such marriages, *Hay v. Northcote*, (1900) 2 Ch. 262; Bills of Exchange Act (English), (1882) 45 and 44 Vict. c. 61 s. 72.

§ 27.
Discharge
of contract.

If a contract is discharged under its proper law it is discharged in India,¹ unless it is only extinguished as regard a form of remedy or procedure,² as by limitation whereby the action and not the right is barred.³ But if the contract is barred by the law of limitation applicable in the forum, the action is not maintainable there.⁴ So an English certificate of bankruptcy bars a suit,⁵ in India, or in the colonies.⁶

¹ *Gibbs v. Société Industrielle*, (1890) 25 Q.B.D. 899 C.A.; Dicey, 2nd Ed. 569-571; Westlake, 4th Ed. 302, 303; Foote, 3rd Ed. 457-455; see *Taylor v. Hollard*, (1902) 1 K.B. 676; cf. *Murugesu Chetti v. Annamallae*, (1899) 23 M. 458, (foreign judgment held discharged by foreign bankruptcy); *Huber v. Steiner*, (1835) 2 Bing. N.C. 202; Laws of England, Vol. VI 247, 306.

² *Vythelingam v. Sectaramaiyar*, 23 M. 449, 455; Dicey, rule 141.

³ *Harris v. Quine*, (1869) L. R. 4 Q. B. 653.

⁴ *Alliance Bank of Simla v. Carcy*, (1890) 5 C.P.D. 429. *Her Highness Ruckmaboye v. Lalloobhoy*, (1851) 5 Mov. I.A. 234, 266.

⁵ *Edwards v. Ronald*, 1 Knapp. P. C. 259.

⁶ *Ellis v. M'Henry*, L.R. 6 C.P. 238; see *Armani v. Castrique*, 13 M. & W. 443 as to foreign certificate.

CHAPTER III.

Interpretation of Contract.

The interpretation of a contract is generally speaking a matter of law, and is governed by certain well established rules.

§ 28.
Generally a matter of law.

Generally speaking the Indian law is the same as the English : the law has not been codified and apart from modification, introduced by the Contract Act, the principles which have been recognised at Common Law have been followed in India.

Generally the same as English Law.

Naturally the question of interpretation only arises when a dispute occurs as to the meaning of a contract.

The law applicable to the construction of a contract is the law governing the contract.

What law applicable.

By interpretation or construction is meant ascertaining the meaning of the language of a document or its application to the facts of the case.¹ The object of interpretation is to ascertain not what the writer intended to say, but what is the meaning of that which he has said.² But there is a liberal and a literal school of interpreters. The literal school, however, admits that the object is not to ascertain the mere grammatical sense of the words, but their meaning as used on that occasion : the liberal school admits that the object is not the intention of the writer generally but the particular intention which he desired to declare by the writing. The divergence of opinion is consequently slight.³ As Thayer puts it,⁴ the question is not what the writer meant, as distinguished from what his words expressed, but simply what is the meaning of his words ? The Court, however, never construes the writing by

§ 29.
Object of interpretation.
Object.

¹ Phipson, 3rd Ed. p. 538 ; Stephen, Art. 91 ; Leake on Contract, 3rd Ed. 184. See *Chatenay v. Brazilian Co.*, (1891) 1 Q.B. 79, 85 C.A.

² Taylor, s. 1201.

³ See Phipson, 3rd Ed. p 539.

⁴ Thayer on Evidence, p 493.

§ 30.
Written
contracts ;
ordinary
meaning.

Entire
contract in
writing.

itself ; the situation of the parties and the surrounding circumstances are always elements to be considered.¹

The first general rule of construction of a written contract is that the language of the instrument is to be understood in its ordinary and natural meaning notwithstanding the fact that such construction may appear not to carry out the view which it may be supposed the parties intended to carry out² ; and evidence may not be given to show that the language was intended to be used by the parties with any other than the ordinary and natural meaning³ except under a trade usage, for there is no such thing as equitable as distinct from legal construction of an agreement, equity in this respect following the law,⁴ and a contract is construed alike in law and equity.⁵ To enquire into what the parties intended, would be to let in oral evidence to explain the contract.⁶ For if the entire contract is in writing, its construction is a question of law, for the parties in consenting to a written agreement contract to be bound by the construction which a Court of law shall put upon the instrument,⁷ and the rule is that the language used by one party is to be construed in the sense in which it would be reasonably understood by the other.⁸

¹ See *Elliott v. Crutchley*, (1906) A. C. 7.

² *Lec v. Alexander*, (1883) 8 App. Cas. 853; *Grey v. Pearson*, (1857) 6 H. L. Cas. 61, 106; *Caledonian Ry. Co. v. N.B.R.*, (1881) 6 App. Cas. 114, 181. *Smith v. Cooke*, (1891) A.C. 297; *Elliott v. Crutchley*, (1906) A.C. 7, 9. *G. W. R. v. Rous*, (1870) L.R. 4 H.L. 650, 659. See however *M'Cowan v. Baine*, (1891) A.C. 401, "ship" held to include "tug" for special reasons, p. 407. *Bramwell L. J.* dissented); *Blore v. Guilini*, (1903) 1 K.B. 356; *Dominion Coal Co. v. Dominion Iron & Steel Co.*, (1909) 25 T.L.R. 309 P.C. (all the coal required held to mean "all the coal suitable in character"). Also see

Nelson v. James Nelson, (1908) A.C. 16 cited below.

³ *Shore v. Wilson*, (1852) 9 Cl. v. Fin. 355 H.L. *Hitchin v. Groom*, (1848) 5 C.B. 515, *McClellan v. Kennard*, (1874) 9 Ch. App. 336.

⁴ 8 Bl. Com., 434; *Eaton v. Lyon*, 8 Ves. 692; *Scott v. Liverpool Corp.*, (1858) 28 L.J. Ch. 230, 235. See *M.G.W. Ry of Ireland v. Johnson*. (1858) 6 H.L. Cas. 798.

⁵ *Parkin v. Thorold*, (1854) 22 L.J., Ch. 170.

⁶ *Bowes v. Shand*, (1877) 2 Ap. Cas. 455.

⁷ *Stewart v. Kennedy*, 15 A. C. 108.

⁸ *Fowkes v. Manchester As. Co.*, (1868) 32 L.J. Q. B. p. 159.

The Court must read the words of a statute in their popular, natural and ordinary sense. The same rule applies to all documents subject to certain exceptions.¹

§ 30.
Construction
of Statutes.

Lord Watson laid it down that contracts ought to be construed according to the primary and natural meaning of the language chosen. But there are exceptions to this rule. One of these is to be found in the case where the contract affords an interpretation different from the ordinary meaning of the words: and another in the case where their conventional meaning is not the same with their legal sense.²

A Madras Bench ruled that in applying the rule, which they considered to be to ascertain the intention of the parties if that was clear, if not to take the words in their ordinary sense, it must also be observed that hardship to either party is not an element to be considered, unless it amounts to a degree of inconvenience and absurdity so great as to afford judicial proof that such could not be the meaning of the parties.³ It has been held that the canons of construction are framed with a view to general results but are sometimes productive of injustice by leading to results contrary to the intention of the parties.⁴

§ 31.
Hardship.

Jessel M. R. held that⁵ there is in law no difference of construction between mercantile contracts and other instruments. The grammatical meaning is, as in other cases, the meaning to be adopted unless there be a reason to the contrary. But it seems that the modern view is as

§ 32.
Construction of Mer-
cantile
Contracts.

¹ *Abra v. Abra*, (1876) 1 B. p. 259, citing *Birks v. Allison*, 13 C.B. N.S. 28; Broom's L. Max. 569, 5th Ed. and cf. *Abbey v. Dale*, 11 C.B. 378 p. 391.

² *McCowan v. Baine*, (1891) A. C. p. 408.

³ *Volkart v. Rutnavalu*, (1892) 18 M. 68, 70, (citing *Prebble v. Boghurst*) 1 Swanston 329.

⁴ *Burchell v. Clark*, (1876) 2 C.P.D. p. 93.

⁵ *Southwell v. Bowditch*, (1876) 1 C. P. D. p. 376, 45 L. J. C. P. 680 p. 681 (as to policies of insurance); see *Robertson v. French*, (1803) 4 E. 180, 185; *Carr v. Montefiore*, (1864) 5 B. S. 408.

The whole instrument and subject-matter to be looked at.

Lord Halsbury put it, "In looking at a document between business men, I do not think it wise to look at technical rules of construction. I think it is well to look at the whole document, to look at the subject-matter with which the parties are dealing, and then to take the words in their natural and ordinary meaning and construe the document in that way";¹ and it was held in an earlier case that in dealing with mercantile instruments the Court must look at the substance of the matter and is not restrained to such nicety of construction as is the case with regard to conveyances, pleadings and the like.² This view was held by Mansfield, C. J., who said that all mercantile documents ought to have a liberal interpretation.³ The Privy Council also laid it down that in construing mercantile contracts the governing principle must be to ascertain the intention of the parties through the words they have used.⁴

Even according to Jessell, M.R., there may be a reason to the contrary; such a reason would be that such a construction would be contrary to the expressed intention of the parties, or would involve some absurdity, repugnance or inconsistency,⁵ when the ordinary meaning of the words may be modified to avoid that absurdity or inconsistency but no further.⁶

§ 33.
No clause
superfluous.
Meaning for
every word.

No clause can be regarded as superfluous; as the House of Lords put it, we must assume that the clause was inserted by the parties for some good purpose and with some definite meaning. This is a mercantile contract: and merchants are not in the habit of inserting in their

¹ *Tatham v. Burr*, (1898) A. C. 382, 386, 67 L. J. P. p. 463.

² *Cockburn v. Alexander*, (1848) 6 C.B. 791, 814, 18 L.J.C.P. 74, 83, *per* Maule, J.

³ *Hatham v. E. I Co.* (1779) 1 Doug. 272, 277.

⁴ *McConnel v. Murphy*, (1873) L. R. 5 P. C. 203, 218.

⁵ *Gether v. Caffer*, (1855) 15 C. B. 696, 706, 24 L. J. C. P. 69, 71, *per* Maule, J.

⁶ *Grey v. Pearson*, 4 H. L. C. 61, 26 L. J. Ch. 481; *Caledonian Ry. v. N. B. Ry.*, 6 Ap. Cas. 131. *Blorc v. Guilini*, (1903) 1 K. B. 356; 72 L. J. K. B. 114.

contracts stipulations to which they do not attach some value and importance." ¹ Every word unless left in by a mistake² ought to operate in some shape or other ; one part must be construed with another that the whole if possible may stand, but a clause or particular sentence totally repugnant to the general intent of the contract is void and must be rejected.³ Their Lordships in the Privy Council stated that the construction which commended itself is one that gave a meaning to every part of the document.⁴ But though the principle of giving a meaning to all expressions is a sound one, it does not justify the importation of a meaning which the expression does not itself suggest and for which another expression equally short and simple would more readily be used, and which materially affects the rights of the parties.⁵ In a Madras case it was ruled that when the intention of the parties to a contract is sufficiently apparent, effect must be given to it in that sense, though some violence be thereby done to the words. When the sense is doubtful the safest course is to take the words in their ordinary meaning.⁶

§ 33.

It is extremely desirable that the law regulating the construction of mercantile contracts and the remedies for the breach of them should, as much as possible, proceed on the same principle in all parts of the world, and especially that this uniformity should prevail in respect of this country and its dependencies,⁷ and *a fortiori* the

§ 34.
**Uniformity
of interpretation
should
prevail
in this
country
and its
dependencies.**

¹ *Bowes v. Shand*, (1877) 2 App. Cas. 455.

² See § 49.

³ *Parkhurst v. Smith*, Willes 332 ; *Solly v. Forbes*, 2 B & B. 38 ; *Eyston v. Studd*, 2 Plowd, 459 ; *Trenchard v. Hoskins*, Wench 98.

⁴ *Thakurrani v. Rae Jagupal*, (1904) 31 I. A. 142 (referring to an Act) and see *infra* as to *construing* as a whole, § 32.

⁵ *Gunon v. Luchmeenarain*, (1896) 23 1 A. p. 125.

⁶ *Volkart Bros. v. Ratnavelu*, (1892) 18 M. 63, citing *Wilson v. Bevan*, 7 C. B. 673.

⁷ *Dimeck v. Corlett*, (1858) 12 Moo. P. C. C. 199, 229 ; cf. *The City of Chester*, (1884) 9 P. D. 182. The American view is that English and American commercial law should be uniform, *Norington v. Wright*, (1885) 115 U.S. 189.

Indian courts ought to proceed on one and the same principle.

§ 35.
Accepted
interpreta-
tions
should
not be
altered in
the least.

Further it is most material that the construction given to mercantile documents years ago, and which has been accepted from that time by Courts of law and in the mercantile world, should not be altered in the least, because all subsequent contracts have been made on the faith of the decisions.¹ For the Court in construing a written contract is entitled to consider the probability that the parties have used words in a sense given to them by well known judicial construction,² and that they had or must be held to have had certain extrinsic facts appearing from the surrounding circumstances of the particular case in their minds when they entered into the contract.³

§ 36.
Exceptions
(1)
Technical
words.*

To the general rule there are two exceptions.⁴ If it is found as a fact that certain words as for example words or phrases employed in art, commerce, etc., or in a particular locality, have been used in a special technical sense other than their ordinary meaning, the Court will construe them in such special technical sense.⁵ In a mercantile contract a technical term is construed according to

¹ *Pandorf v. Hamilton*, (1886) 17 Q. B. D. 671, 673, 55 L. J. Q. B. 546, *per* Esher M. R.; *Lohre v. Aitchison*, (1878) 3 Q. B. D. p. 562; see *Abdul Aziz Khan v. Appayisami*, (1903) 31 I. A. 1 (as to marine policies). See as to technical terms *Pledge v. White*, (1896) A. C. p. 190; see for principle of stare decisis *Mandlall v. Bank of Bombay*, (1910) 12 Bom. L. R. 316 (as to meaning of Contract Act s. 178).

² *Thames and Mersey Marine Ins. v. Hamilton*, (1887) 12 App. Cas. 484, see *ibid* p. 490; *per* Halsbury L. C. p. 494. Decisions. For contracts on faith of decisions see *Palmer v. Johnson*, (1884) 13 Q. B. D. 351, 358, 53 L. J. Q. B. 348, 351; *Phillips v. Rees*, (1889) 24 Q. B. D. 17, 59 L. J. Q. B. 14; but see

Quin v. Latham, (1901) A. C. p. 506.

³ *Birrell v. Dwyer*, (1884) 9 Ap. C. 345, 358.

⁴ See *M'Cowan v. Baine*, (1891) A. C. 401, 408.

⁵ *Mullan v. May*, (1844) 13 M. & W. 511, 518; *Bold v. Rayne* (1836) 1 M. & W., 343; *Studdy v. Sanders*; (1826) 5 B. & C. 628; *Goblet v. Beechey*, (1829) 3 Sim. 24; *Shore v. Wilson*, (1842) 9 Cl. & Fin. 355, 555, 556; *H. L.*; *Robey v. Arnold*, (1898) 14 T. L. R. 220 C. A. Evidence of usage is analogous to translation, *Grant v. Maddox*, (1846) 15 M. & W. 787, 746; as to translations generally *De Sora v. Phillips*, (1883) 10 H. L. Cas. 624; *Chalénay v. Brazilian Co.*, (1891) 1 Q. B. 79 C. A. 60 L. J. Q. B. 295.

the sense¹ in which they are commonly used by merchants and not that in which they are used by men of science.² For "meaning" means in commercial contracts ordinary mercantile sense.³ But evidence will not be admitted of such technical or secondary meaning of words unless the Court is satisfied either from the context or from the circumstances of the case, that the parties did not intend to use the words in their primary or ordinary sense.⁴ It has been held that even if a different meaning was contemplated by the parties at the time, unless the context shows such different meaning, it would be disregarded;⁵ but as pointed out above all the circumstances of the case and not merely the context must be considered, and the modern rule is that though the context by itself is quite clear still a trade usage is admissible to show the meaning of any word or phrase.⁶ Although evidence of a particular custom or usage is not admissible to annex a new term or condition which is inconsistent with or repugnant to the express terms of the instrument⁷ evidence of such a custom or usage is admissible to alter the apparent meaning of the words

¹ *Hart v. Standard*, (1889) 22 Q. B. D. 499 C. A.; *Moody v. Surreddge*, (1794) 2 Esp. 633 (insurances policies).

² This exception is founded on the rule that trade usage may be proved to show the meaning of words; see § 89.

³ *Robertson v. French*, 4 East. 185; *Mallan v. May*; 18 M. & W. 517, 18 L. J. Ex. 48; *Holt v. Collyer*, 50 L. J Ch 311.

⁴ *Biddlecombe v. Bond*, (1835) 4 Ad. v. El. 332; *Parkar v. Gossage*, (1838) 2 Cr. M. & R. 617; *Holt v. Collyer*, (1881) 16 Ch. D. 718; *Elliott v. Turner*, (1845) 2, C. B. Ch. 46, 461 Ex.,

⁵ *G.W. Ry. v. Rous*, (1870) L.R. 4 H. L. 659.

⁶ See § 89 for trade usages.

⁷ *Abbott v. Bates* (1875) 45 L.J. Q. B. 117 C. A.; *Bower v. Jones* (1831) 8 Bing. 65; *Warde v. Stuart* (1856) 1 C. B. N. S. 88; *Fullwood v. Akerman*, (1862) 11 C. B. N. S. 737; *Biggs v. Gordon* (1860) 8, C. B. N. s. 638; *Caine v. Horsfall*, (1847) 1 Ex. 519; *Parker v. Ibbetson*, (1858) 4 C. B. N. S. 346; *Cruse v. Paine*. (1869) 4 Ch. App. 441; *Barrow v. Dyster*, (1884) 13 Q. B. D. 635; *Wright v. Zelland* (1908) 1 K. B. 63 C. A.

and to show that they were intended to be used with reference to the custom or usage in a special sense.¹

**§ 37.
Exception
(2)
Context.**

When the contract itself shows that words were not intended to be used in their ordinary sense such words are construed in harmony with the context,² and a greater regard is paid to the intention of the parties as appearing from the instrument when construed as a whole than to any particular words they may have used to express their intention³: or as it has been expressed the ordinary grammatical construction is to be followed unless it is repugnant to the general context.⁴

Whole contract to be considered.

But it seems clear that the principle that the whole contract must be considered in order to ascertain the meaning of any particular part thereof, has been generally accepted⁵

Loreburn, L.C., laid down a very broad rule : the question to be considered, he held, is what do the words mean on a fair reading having regard to the whole document.⁶

Where a document is equivocal the whole of it must be

¹ See under trade usages : *Grant v. Maddox*, (1846) 15 M. & W. 787 (years in theatrical sense); *Smith v. Wilson*, (1832) 8 B. & Ad. 728 (1000 rabbits); *Myers v. Sarl* (1860) 30 L. J. Q. B. 9, 3 E. & E. 306; *Brown v. Byrne*, (1854) 3 E. & B. 703, 716; *Norden Steam Co. v. Dempsey*, (1876) 1 C. P. D. 654; *Kelly v. London Pavillion Co.*, (1898) 14 T. L. R. 234 C. A.; *Southland Frozen Meat Co. v. Nelson*, (1898) A. C. 442 P. C. (words interpreted in a business sense). See *Blow v. Lewis*, (1902) 19 T. L. R. 127; *Hardie v. Balmain*, (1902) 18 T. L. R. 539 C. A.; *Cockran v. Leckie*, (1906) 8 F. 975; *Dawson v. Isle*, (1906) 1 Ch. 638 (book debt).

² *McCowan v. Baine*, (1891) A. C. 401, 408.

³ *Ford v. Beech*, (1848) 11 Q. B. 847, 866; see too *Dominion Coal Co. v. Dominion Iron Co.*, (1909) 25 T. L. R. 309 P. C.

⁴ *Lees v. Mos'ey*, 5 L. J. Ex. 78; *Elliott v. Turner*, 15 L. J. C. P. 49.

⁵ *Barton v. Fitzgerald*, (1812) 15 East, 530; *Sicklemore v. Thistleton*, (1817) 6 M. & S. 9; *Elderslie v. Borthwich* (1905) A. C. 98; *National Provincial Bank v. Marshael*, (1888) 40 Ch. D. 112; *Coles v. Hulme*, (1825) 8 B. & C. 568; *Bickmore v. Dimmer* (1903), 1 Ch. 158 C. A.

⁶ *Nelson v. James Nelson*, (1908) A. C. 16 p. 20; 77. L. J. K. B. 82, 84; *McEntire v. Cross'ey*, (1895) A. C. p. 468.

examined and also the surrounding circumstances, and evidence not only of trade usage but of the usage of the parties is evidence of surrounding circumstances, and in the absence of a special contract the allowance and custom of trade may be the only medium to ascertain what is due.¹ § 37.

Leake considers this exception a concurrent rule which may sometimes operate exceptionally to the former, that is that the particular words must be construed with reference to the intention drawn from the whole document.²

The words of course must be capable of bearing the meaning which is sought to be put upon them³

When the contract is to be ascertained from a series of letters or documents the whole of the correspondence must be looked at, and, although two letters in the course of such correspondence may appear to contain a completed contract, the Court will not hold the contract to be complete when subsequent letters show that certain terms had not been agreed upon.⁴ If the whole contract is made by a series of letters, their construction is a question of law, but not if partly made by an oral agreement.⁵ The leading case was considered in India, and it was held that the principles of law laid down in *Hussey v. Horne Payne*⁶ are that the whole correspondence must be looked at : you must look at the whole of what took place and passed between the parties. "We take that to mean that we must not merely look to the letters and the whole correspondence,"

§ 38.
Contracts
made by
letters.

Contract by
correspondence.

¹ *Paul Beier v. Chotalall*, (1904) 30 B. 1. C. A.

² Leake, 5th Ed. 144 ; *Ford v. Beech* 11 Q. B 866 ; 17 L. J. Q. B. 114.

³ *Gibson v. Minet*. (1791) 1 H. Bl. p. 615; *U. S. v. U. P. R. R. Co.* 98 U.S. p. 86 ; *Black v. Bachilder* ; 120 Mass. 171.

⁴ *Hussey v. Horne Payne*, (1879) 4 App. Cas. 311, 48 L. J. Ch. 846 ;

see however *Bolton v. Lambert*, (1889) 41 Ch. D. 295, 304 C. A. where that case is explained; *Bristol v. Maggs*, (1890) 44 Ch. D. 616, 59 L. J. Ch. D. 472 ; see *Maconchy v. Trower*, (1894) 2 I R. 663 H. L.

⁵ *Key v. Colesworth*, 22 L. J. Ex. 4 ; and see §. § 30, 59.

⁶ 4 A. C. p. 316.

§ 38. but also at the conduct of the parties and see if we can spell out a contract containing definite terms. No contract can be held established even by letters which would otherwise be sufficient for the purpose, if it is clear upon the facts that there were other conditions of the intended contract beyond and besides those expressed in the letters which were still in a state of negotiation only, and without settlement of which the parties had no idea of concluding an agreement."¹

So when there are several clauses in a bill of lading, as far as possible they must be construed consistently with one another, and one of them ought not to be treated as surplusage, and rejected unless it is impossible to read it with the other clauses.²

§ 39.
Extraneous
circum-
stances,
Antecedent
conduct,
Deleted
words.

When a contract has in fact been completed and reduced to writing the Court is not entitled to consider antecedent facts or correspondence or to look at words deleted³ before the conclusion of the contract in order to ascertain the meaning of the contract in writing finally agreed upon.⁴ Acts done after the agreement may, however, be relevant in interpreting it as part of the surrounding circumstances.⁵

But the action of the buyers long after the contract would hardly be evidence of what was the intention of the party at the date of the contract.⁶ And the whole system of construing documents *ex post facto* has been held not to be the law as regards commercial contracts.⁷

¹ *The Aryodaya Co. v. Javalprosad*, (1903) 5 Bom. L. R. 909.

² *Borthwick v. Elderslie*, (1904) 1 K. B. 319, 324, (1905) A. C. 98 and see *infra* as to words left in by mistake, § 49.

³ Phipson argues that deleted words should be treated as part of the surrounding circumstances to be considered, see § 55.

⁴ *Inglis v. Buttery*, (1878) 3 App. Cas. 552; *Lee v. Alexander*, (1893) 8 App. Cas. 853.

⁵ *Monro v. Taylor*, (1850) 8 Hare 51, 56. 21 L. J. Ch. 525.

⁶ Blackburn, 3rd Ed p. 1901, referring to *Logan v. LeMesurier*, (1847) 6 Moo P.C. 116; *Acraman v. Morrice*, (1849) 19 L. J. C. P. 57.

⁷ *Wallis v. Pratt*, (1911) A.C. 394 H. L.

Evidence of previous dealings between the parties is admissible only for the purpose of explaining the term used in a contract, and not to impose on a party an obligation as to which the contract is silent, or to read into the contract a liability that otherwise could not exist.¹

Previous
dealings.

There are cases where evidence may be given to show that a contract was entered into in consideration of a collateral antecedent contract between the parties, as in *Erskine v. Adeane*² and *Morgan v. Griffith*,³ but no subsequent contract founded only on the same consideration as the principal contract can be given in evidence, for it obviously cannot form the consideration of the main contract, which was complete before it came into existence, and it cannot add to or vary that contract without infringing the elementary rules of evidence, and unless it can form part of such contract it has no consideration to support it. When a contract is expressed in a formal document or in a letter of offer and a letter of acceptance, no antecedent or subsequent negotiations are admissible to construe such contract.⁴

In certain cases parol evidence may also be given to explain a latent ambiguity in order to show that the subject matter intended by one party was not identical with that intended by the other, and so to establish a mistake defeating the contract as the parties were not *ad idem*⁵ or to identify the subject matter to which the writing refers.⁶

§ 40.
Latent
ambiguity.

¹ *Haji Mahomed v. E. Spinner*. (1900) 24 B. 510, 525; see *Bourne v. Galliff*, (1844) 11 C. & F. 45, *Ford v. Yates*, (1841) 2 M. & G. 549. 10 L. J. C. P. 117.

² (1873) L. R. 8 Ch. Ap. 756.

³ (1871) L.R. 6 Ex 70.

⁴ *Bristol Tramways Co. v. Fiat Motors*, (1910) 2 K.B. p.839 C.A.; *Inglis v. Buttery*, (1878) 3 App. Cas, 552, 577. See § 507.

⁵ *Raffles v. Wichelhaus*, (1864) 38 L. J. Ex 160.

⁶ *Bateman v. Phillips*, (1812) 15 East. 272; *Shortrede v. Check*, (1834) 1 A. & E. 57; *Mumford v. Gelting*, (1859) 7 C.B.N S. 805; *Chambers v. Kelly*, (1873) 7 Ir. R.C.L. 231; *Macdonald v. Longbottom*, (1859) 29 L. J. Q.B. 256; but see *Sarl v. Bourdillon*, (1856) 26 L.J. C.P. 78.

§ 41.
Patent
ambiguity.

Generally if the language of a document is ambiguous or defective no evidence can be given to explain or amend the document.¹ But under the Contract Act section 29 agreements the meaning of which is not certain or capable of being made certain are void.

Where there is a patent ambiguity, as for instance the expression "maximum average" when one or the other word must go out or be modified, the Court can construe the phrase in accordance with the intention of the parties.²

Apparently evidence might be given that the words were written by mistake in the hurry of business.³

When the provisions of the contract are equivocal, the document must be examined as a whole and in its several parts, and also the surrounding circumstances. In the absence of a special contract the allowance and custom of trade is the only medium to ascertain what is due. For where the terms of a contract are equivocal, a custom of trade showing the relations of the parties in such circumstances is not repugnant or inconsistent with the express terms of the contract.⁴

Recitals.

The construction of an ambiguous stipulation in a written agreement may be governed or qualified by a recital, but if the intention is clearly to be collected from the operative words, that intention is not to be defeated or controlled because it may go beyond what is expressed in the recital.⁵

Extras not mentioned in the contract were disallowed.⁶

When words are capable of two meanings the object with which they are inserted may be looked at in order to arrive at the sense in which they were used,⁷ and where

¹ Ev. Act, s. 93: see ss. 94-97; see to Specific Relief Act, s. 21.

² *Bengal Coal Co. v. Homce Wadia*, 24 B. 97 A.C. (1899).

³ *Ibid.* p. 103.

⁴ *Roberts v. Jackson*, (1817) 2 Stark, 225; *Paul Beier v. Chotalal*, (1904) 30 B.L. C.A.

⁵ *Marcar v. Sigg*, 2 M. 239.

⁶ *Lauder v. E.B.Ry. Co.*, 1 Ind. Jur. N. S. 320.

⁷ *Moody v. Surridge*, (1794) 2 Esp. 633; *Hart v. Standard Ins. Co.*, (1889) 22 Q. B. D. 499; *C. A. M'Cowan v. Baine*, (1891) A. C. 401, 408.

one interpretation is consistent with what appears to have been the intention of the parties and another repugnant to it, the Court will give effect to the apparent intention, provided it can do so without violating any of the established rules of construction.¹

§ 41.

In this connection the domicil of the parties and place of execution may also become material.²

Generally speaking where there are several ways of performing a contract the mode may be adopted which is least profitable to the person complaining of the breach.³ When a bill of lading meant one thing to the shipowner and another to the shipper the document was construed according the shipper's view.⁴ When a document might be treated as a bill of exchange or a promissory note, the holder was allowed to elect, as against the maker, to treat it as either.⁵ So where a carrier gave two different notices limiting his liability, the less favourable to him was adopted.⁶ But this rule of constructing *contra proferentem* is only applied when all other principles fail,⁷ and has been expressed in very guarded terms⁸ and altogether doubted.⁹

A similar principle is applied in another class of cases which form an exception to the general rule. It is established law that when an agent acts on ambiguous instructions, and construes them *bonâ fide* in a particular way, the principal cannot be heard to say that he meant something different. So in *Ireland v. Livingstone*¹⁰ it was held

§ 42
Ambiguous
instructions.

¹ *Solly v. Forbes*, (1820) 2 Brod. and Bing. 39, 43; *Parkhurst v. Smith*, (1742) Willes, 327, 332; *Hayne v. Cummings*, (1864) 16 C. B. N. S. 421.

² *Lansdowne v. Lansdowne*, (1820) 2 Bl. 60 H. L.; *Brown v. Fletcher*, (1876) 35 L. T. 165.

³ *Cockburn v. Alexander*, (1848) 6 C. B. 791, 814.

⁴ *Elderslie v. Borthwick*, (1905) A. C. p. 97, per Lord Lindley.

⁵ *Edis v. Bury*, (1827) 6 B. & C. 433.

⁶ *Munn v. Baker*, 2 Stark 255.

⁷ Bac. Max, Reg. 3, *Love v. Pares*, 13 East. 80; *Mackenzie v. M.*, (1891) 64 L. T. p. 709.

⁸ *Neill v. Duke of Devonshire*, (1882) 8 A. C. p. 149.

⁹ *Taylor v. Corporation of St. Helens*, (1877) 6 Ch. D. 264, 270.

¹⁰ 41 L. J. Q. B. 201, L. R. 5 H. L. 395.

§ 42. that a commission agent was not liable, in such circumstances, and in Bombay¹ it was held that an agent is not liable if he acts on ambiguous instructions and construes them in a way in which it was open to him so to do. The principle laid down in *Ireland v. Livingstone*² is not confined to cases between principal and agent, but is of wider application. When a person makes a communication to another in ambiguous terms he cannot afterwards complain if the recipient of the communication *bonâ fide* puts upon it a meaning not intended by the sender. The principle was held to apply to a joint telegram ambiguous in its terms, sent by shipowners and charterers to the captain of the chartered ship, when the captain *bonâ fide* acted upon a construction of the telegram of which it was capable but which was not intended by the senders.³

It seems that on the authority of the last cited case that the principle would apply to all written orders of an ambiguous nature, when the recipient acting reasonably and *bonâ fide*, alters his position owing to a possible interpretation of a document, although it may be a mistaken one, for the rule has recently been laid down broadly³; but the surrounding circumstances must, it seems, be considered, as for instance, to see what opportunity there was for the party to have the orders repeated or confirmed but this circumstance will be immaterial if the party *bonâ fide* acted on his interpretation without being aware of, any other.³ For where a person makes a communication to another in ambiguous terms he cannot afterwards complain if the recipient puts a meaning on it not intended by him. Of course if the mistake is made by a telegraphic clerk,⁴ there is no contract.⁵

¹ *Jivraj Singhji v. Norwich As. Co.*, (1903) 5 Bom. L. R. 853 O. C.

² 41 L.J.Q.B. 201 L.R. 5 H.L. 395.

³ *Miles v. Haslehurst*, (1907) 12 Com. Cas. 88, 23 T. L. R. 142 O. C.

⁴ *Hajee Ismail v. James Short*, 8 M. L. T. 353.

⁵ *Henkel v. Pape*, (1870) 40 L. J. Ex 15. *Postal Tele. Co. v. Sepacfer*, (1901) 62 S. W. 1119.

If an agreement provides for two alternative promises without saying at whose option one of the alternatives is to be exercised the general rule is that the option lies with the party who is to do the thing in question.¹ If the option is with the promisee he must give notice of his election before any liability can attach to the promisor.²

§ 43.
Alter-
natives.

It is said that an election once made cannot be revoked,³ but it seems that this is only so when the other party would be prejudiced if it were.⁴

If the option is with the promisor and one alternative is impossible at the date of the contract, it would seem that as he must have contracted only on the supposition that he should have an option, that the contract is void for mutual mistake. There is authority to the effect that the possible alternative must be performed.⁵ But in India probably section 56 would apply as the contract is impossible to perform. But if one alternative is illegal at the time of the contract and the other legal, the legal one may be enforced.⁶

If an election has been made and the alternative selected becomes impossible, it seems the promisor is discharged

¹ *Tielens v. Hooper*, (1850) 5 Exch. 830; *Reed v. Kilburn*, (1875) L. R. 10 Q. B. 264; *Chippendale v. Thurston*, (1829) 4 C. & P. 98; *Layton v. Pearce*, (1778) 1 Doug. K. B. 15; *Tilling v. James*, (1906) 94 L. T. 823; *Stewart v. Rendall*, (1899) 36 Sc. L. R. 775; 1 F. (Ct. of Sess.) 1002. As to leases *Powell v. Smith*, (1872) 41 L. J. Ch. 734; *Fowell v. Tranter*, (1864) 3 H. & C. 458. (Goods at 6 or 9 months' credit the purchaser has the option.) *Price v. Nixon*, (1814) 5 Taunt 388; *Deverill Burnell*, (1873) L. R. 8 C. P. 475, 480; see, however, *Ashforth v. Redford* (1878) L. R. 9 C. P. 20 (from

"6 to 8 weeks" held to have special mercantile sense.)

² *Calaminus v. Dowlais*, (1878) 47 L. J. Q. B. 575; *Honck v. Muller*, (1881) 7 Q. B. D. 92; *Thorn v. City Rice Mills*, (1889) 40 Ch. D. 857.

³ *Schneider v. Foster*, (1857) 2 H. and N. 4; *Brown v. Royal Ins. Co.*, (1859) 1 E. & E. 853; *Reuter v. Sala*, (1879) 4 C. P. D. 239.

⁴ *Rugg v. Weir*, (1864) 16 C. B. N. S. 471; *Gath v. Lees*, (1865) 3 H. & C. 558; see § 184.

⁵ *Wharton v. King*, (1881) 2 B. & Ad. 528; *Stevens v. Webb*, (1885) 7 C. & P. 60.

⁶ Contract Act s. 58.

§ 43. under section 56,¹ for the position is the same as if the original contract was to perform the act selected.¹ If before election one branch becomes impossible it is a question of construction whether the promisor was intended to have the option and is therefore discharged, or whether he promised to do one or the other and so must perform the possible one.²

If the promisor has allowed the date of performance of one alternative to elapse he is deemed to have elected to perform the other ;³ so also if he has rendered the other impossible.⁴ If it is by the promisee's fault that one alternative becomes impossible the promisor is discharged.⁵ If neither alternative is performed damages are given for the failure to perform the less profitable to the promisee.⁶

§ 44.
Construction in
favour of
validity.

Similarly the Court leans to an interpretation which will effectuate rather than one which will invalidate an instrument,⁷ and in construing two contemporaneous documents to a construction which will reconcile them rather than one which will render them inconsistent, and if one is ambiguous and the other clear, then effect is given to the clear one to interpret the other.⁸ So if one construction makes the contract lawful and another unlawful, the former is preferred.⁹ A statement of

¹ See *Brown v. Royal Ins. Co.*, (1859) 1 E. & E. 858; *Reuter v. Sala*, (1879) 48 L. J. C. P. 492.

² *Barkworth v. Young*, (1856) 26 L. J. Ch. 153; *Anderson v. Commercial Union As. Co.*, (1886) 55 L. J. Q. B. 148, 150 C. A.

³ *Price v. Nixon*, (1813) 5 Taunt. 388; *Reed v. Kilburn*, (1875) 44 L. J. Q. B. 126.

⁴ *McIlquham v. Taylor*, (1895) 1 Ch. 58. 64 L. J. Ch. 296.

⁵ *Basket v. Basket*, (1677) 2 Mod. 200.

⁶ *Deverill v. Burnell*, (1873) 42 L. J. C. P. 214.

⁷ *Haigh v. Brooks*, (1839) 10 Ad. & El. 309 Ex. Ch.; *Wilkinson v. Gaston*, (1846) 9 Q. B. 137; *Pollock v. Stacy*, (1847) 9 Q. B. 1033; *Mills v. Dunham*, (1891) 1 Ch. 576, 596, C. A.; *Goldshede v. Swan*, (1847) 1 Ex. 154.

⁸ *Re Phoenix Bessemer Steel Co.*, (1875) 44 L. J. Ch. 438.

⁹ *Lewis v. Davison*, (1839) 4 M. & W. 654; Co. Lit. 42, 183; *Shore v. Wilson*; 9 Clark & F. 355; *Att. Gen. v. Clapham*; 4 De G. M. & G. 591; *Moss v. Bainbrigge*, 18 Beav. 487.

consideration in a contract will be taken to be past or present so as to validate the contract ¹ Similarly where of several grantors one only has the right to convey, the conveyance is construed as his alone ² and if things are to be done, it is presumed that they are to be done in the manner required or indicated by law.³

Words however general may be limited with respect to the subject-matter in relation to which they are used. General words may be restricted to the same genus as the specific words that precede them, *i.e.*, the genus as applicable to the species enumerated, and not any analogous genus ; or they must be construed with reference to the scope and purpose of the instrument in which it occurs.⁴ The most common application of this rule occurs in the construction of policies of insurance, where special enumerated risks are insured against followed by a general clause insuring against all risks whatsoever the last clause being construed as limited to risks of the same nature as those previously mentioned.⁵

§ 45.
**Ejusdem
generis.**

The rule is but a working canon and may have to bend to the circumstances.⁶

Where there are no general words one expressed point excludes all others of the same class.⁷

Exceptions in a contract are as a general rule to be construed strictly against the party in whose favour they are inserted, on the ground that those who wish to

§ 46.
Exceptions.

¹ *Haigh v. Brooks*, (1839) 10 A. & E. 309 ; *Goldshede v. Swan*, (1847) 16 L. J. Ex. 284.

² *Shep. Touch.* 81, 82.

³ *Harrington v. Klopogge*, 4 Doug. 5 ; *Clarke v. Pinney*, 7 Cowen 681.

⁴ *Thames v. Hamilton*, (1887) 12 App. Cas. p. 490, 494.

⁵ *Thames v. Hamilton*, (1887) 21 App. Cas. 484 ; *Lee v. Alexander*,

(1883) 8 App. Cas. 853 ; *Cullen v. Butler*, (1816) 5 M & S. 461 ; see *Early v. Rathbone*, (1898) 57 L. J. Ch. 652 ; *Crompton v. Jarratt*, (1885) 30 Ch. D. 298 C. A. ; *Lambourn v. McLellan*, (1903) 2 Ch. 268 C. A.

⁶ *Earl of Jersey v. Guardians of Poor of Neath*, (1889) 22 Q. B. D. 555, 561 ; 58 L. J. Q. B. 573, 577, per Bowen L. J.

⁷ *Hare v. Horton*, 5 B. & Ad. 715.

§ 46. introduce words in a contract in order to shield themselves ought to do so in clear words.¹ General Common Law liabilities will not be held to have been excepted unless it plainly appears that it was intended to except them;² the exception to be efficacious must be unambiguous; but this does not apply except to Common Law liabilities.³

If two constructions are possible one exempting from negligence, it requires clear words to induce the Court to adopt that construction.⁴

Clause
exempting a
shipowner
from
liability.

And unquestionably if in a clause in a bill of lading exempting a shipowner from liability there is an ambiguity, the document must be construed in favour of the shipper.⁵

§ 47.
Repugnant
condition.

On the same principle a condition which is repugnant to the nature of the grant is void and may be rejected.⁶

So a proviso wholly inconsistent with a covenant is void and may be rejected and a misdescription may be rejected upon the principle of *Falsa Demonstratio non nocet*.⁷ But this maxim only applies if the false demonstration is added to what was sufficiently clear before.⁸ In written documents *inter vivos* of two inconsistent clauses the first is preferred.⁹

¹ *Burton v. English*, (1883) 12 Q. B. D. 218 O. A.; *Blackett v. Royal Exchange*, (1882) 2 Cr. & J. 244; *Taylor v. Liverpool*, L. R. 9 Q. B. 546. See the *Pearlmoor*, (1904) P. 286; *Elderslie v. Borthwick*, (1905) A. C. 93.

² *Borthwick v. Elderslie*, (1904) 1 K. B. 319, 324; 73 L.J.K.B. 240, 243.

³ *The Westcock*, (1911) 104 L. T. 736 C. A.

⁴ *Price v. Union Lighterage, Co.* (1904) 1 K. B. 412 C. A.; *Savill v. Bethell*, (1902) 2 Ch. 523 C. A.; *Fowkes v. Manchester*, (1868) 3 B. & S. 917; *Birrell v. Dryer*, (1884) 9 App. Cas. 345.

⁵ *Baerselman v. Bailey*, (1895) 2 Q. B. 801, 805; 64 L. J. Q. B. 707, 810.

⁶ *Solly v. Forbes*, (1820) 2 Erod & Bing. 38. *Re State Fire Ins.*, (1863) 82 L. J. Ch. 300.

⁷ *Furnivall v. Coombes*, (1848) 5 Man & G. 786; *Cheshire Lines v. Lewis*, (1890) 50 L. J. Q. B. 121 C. A.

⁸ *The Moorcock*, (1889) 14 P. D. 64 C. A.; *Saner v. Bilton*, (1878) 7 Ch. D. 815; *M'Intyre v. Belcher*, (1868) 14 C. B. N. S. 654; *Ogdens v. Nelson* (1905) A. C. 169.

⁹ *Youde v. Jones*, 13 M. & W. 535. (1844).

No one can escape liability for his own fraudulent statements by inserting in a contract a clause that the other party is not to rely on them. Though he might by an apt clause escape from liability for the fraud of his agent.¹ No subtlety of language, no craft or machinery in the form of a contract can estop a person who complains that he has been defrauded from having the question submitted to the Jury.² Such a clause might be appropriate and fairly apply to errors, inaccuracies and mistakes,³ if aptly worded,⁴ but an express term that fraud shall not vitiate a contract would be bad law.⁵

§ 48.
Fraud.

In construing a written contract effect should be given to every word if possible⁶ which does not appear to have been left in by mistake.⁷

§ 49.
Errors.

Obvious mistakes may be corrected, and words obviously omitted may be supplied.⁸ Printed words left in by mistake may be discarded if it was obviously not intended that they should form part of the contract,⁹ particularly when they are inconsistent with written words.¹⁰ In insurance policies it is most unusual to find superfluous or inapplicable words struck out in the printed form, and in such policies printed words have been discarded although it was possible to construe both the written and printed words together, but the printed words had been left in by carelessness.¹¹

Obvious
mistakes.

¹ *Pearson v. Dublin Corporation*, (1907) A. C. p. 354, *per* Loreburn, L. C.

² *Ibid.*, *per* Lord Halsbury.

³ *Ibid.*, *per* Lord Asbourne.

⁴ *Wallis v. Pratt*, (1911) A.C. 394.

⁵ *Pearson v. Dublin Corporation*, (1907) A. C. p. 354, *per* Lord James.

⁶ *See* § 33.

⁷ *Elderslie v. Borthwick*, (1905) A. C. p. 96; *Hayne v. Cummings*, (1864) 16 C. B. N. S. 421, 426; *Doe v. Godwin*, (1815) 4

M. & S. 265; *Tielens v. Hooper*, (1850) 5 Exch. 830; *Hitchen v. Groom*, (1848, 5 C. & P. 515.

⁸ *Wilson v. W.* 5 H. L.C. 40, 23 L. J. Ch. 697; *Mourmand v. Le Clair*, (1903) 2 K. B. 216; *Re Dayrell*, (1904) 2 Ch. 496, 72 L. J. C. 795.

⁹ *Carlisles v. Hurmook Roy*, (1883) 9 C. 679 (O. C.)

¹⁰ *Dudgeon v. Pembroke*, 2 App. Cas. 284 (1877) 46 L. J. Ex. 409.

¹¹ *Western Ass. v. Poole*, (1908) 1 K. B. 378, 72 L. J. K. B. 123.

§ 49. The commonest case is that of a charter effected by filling in a printed form where parts of the printed form left in by inadvertence are in direct contradiction to clauses written in the form : in these cases the written clause should usually prevail.¹ And it has been held that it is unnecessary to find a meaning in the particular charter for every word in a common printed form.²

§ 50.
Variations
between
printed and
written
clauses.

Generally speaking there is no difference in importance between words merely because they are printed or written.³ But where a contract is partly written, partly a printed form and there is an inconsistency between the printed words and the writing, more weight is given to the written words⁴ for greater effect, in the case of an ambiguity, is given to the immediate language selected by the parties than to the printed form intended for general application.⁵ In *Glynn v. Margelson*,⁵ Lord Herschell after saying that though it was not legitimate to discard the printed words the main intent and object of the contract must be considered, proceeded to disregard the printed form.

According to a Bombay ruling where there is an inconsistency between the printed and written provisions of the contract, the printed words must not be discarded, though if the printed words are mere formal and general words which are always put into such contracts and customary

¹ *Scrutton v. Childs*, (1877) 36 L. T. 212 ; contra *Baumvoll v. Gilchrest* ; (1891) 2 Q. B. p. 317.

² *Gray v. Carr* ; (1871) L. R. 6 Q. B. 522 ; *Pearson v. Göschen*, (1864) 17 C. B. N. S. 352 ; contra *McLean v. Fleming*, (1871) L. R. 2 H.L. (Sc.) 128 ; and as to words left in by mistakes see *supra* and *Western Ass. v. Poole*, (1903) 1 K.B. 378, 72 L.J.K.B. 123; *Dudgeon v. Pembroke*, 2 Ap. Ca. 284, 46 L.J. Ex. 409; *Carlises v. Hurmook Roy*, (1883) 9 C. 679.

³ *Leake*, 5th Ed. 143.

⁴ *Robertson v. French*, (1808) 4 East. 130, 135 ; *Joyce v. Realm Ins. Co.*, (1872) L.R. 7 Q.B. 580; *Western Ass. Co. v. Poole*, (1908) 1 K.B. 376, 388 ; *Gumm v. Tyrie*, (1865) 6 B. & S. 298; *Paul Bcier v. Chotalall*, (1904) 30 B. 1 ; also *Jessel v. Bath*, (1867) L.R. 2 Exch. 267; *Magec v. Lavell*, (1974), L.R. 9 C. P. 113, 43 L. J. C. P. 181.

⁵ *Glynn v. Margelson*, (1898) A. C. 351, 354 ; *The Nifa*, (1892) P. 411 ; *Scrutton v. Childs*, 36 L. T. 212.

terms and the written words are special and peculiar, probably the written words should have more weight.¹

§ 50.

The filling up of blanks in a printed form with lines is presumably done only to prevent words being inserted, and not to cancel the whole passage.² Of course it makes no difference if some printing is large and some small.³

A pencil signature is valid.⁴

Pencil
writing.
§ 51.
Difference
between
words and
figures.

In case of difference between words and figures, the written words as a general rule prevail, and parol evidence is not admissible to show that there was an omission in the words.⁵

"Maximum average" has been construed to mean "maximum quantity" as being obviously a mistake for that phrase.⁶

Similarly words may be struck out which have obviously been left in by mistake,⁷ or which are immaterial or surplusage;⁸ and misspelling⁹ and grammatical errors may be corrected.¹⁰

§ 52.
Surplusage.

If there are punctuation marks they must be allowed their proper effect,¹¹ and for the purpose of giving effect to the whole of that document the Court may insert stops

§ 53.
Punctuation
marks.

¹ *Paul Beier v. Chotalall*, (1904) 30 B. 1 A.C., Jenkins, C J., citing *Gumm v. Tyrie*, (1864) 33 L. J. Q. B. 97 p. 111; see however *John Carlisle v. Nathmull*, (1864) 2 Hyde 242.

² *Gumm v. Tyrie*, 33 L. J. Q. B. 97.

³ *Elderslie v. Borthwick*, (1905) A. C. 98; see however as to charter parties, &c., Scrutton.

⁴ *Lucas v. James*, (1849) 7 Hare 410; as to pencil writing in wills see *Francis v. Grover*, (1845) 5 Hare 39, *Re Adams*, (1872) L. R. 2 P. & D. 367.

⁵ *Saunderson v. Piper*, (1839) 5 Bing. N.C. 425; cf Bills of Exchange Act (English), 1862 s. 9.

⁶ *Bengal Coal Co. v. Homee*, (1899) 24 B. p. 103 A.C.

⁷ *Dudgeon v. Pembroke*, (1877) 2 App. Cas. 284; see *Buller v. Wigge*, (1667) 1 Wms. Saund. 64.

⁸ *Waugh v. Bussell*, (1814) 5 Taunt. 707, 711.

⁹ *Hulbert v. Long*, (1626) Cro. Jac. 607; *Mauleverer v. Hawrey*, (1670) 2 Saund. 79.

¹⁰ *Glen v. Lancashire*, (1906) 8 F. 815; *Wells v. Wright*, (1678) 2 Mod. Rep. 285.

¹¹ *Gunslett v. Carter*, 17 Beav. 506; 23 L. J. Ch. 219.

§ 53. and parentheses when they are missing¹ ; and may also supply words when it is clear from the instrument itself that they have been omitted by inadvertence.²

§ 54.
Insensible
words.

Insensible words may be rejected.³

§ 55.
Deleted
words.

It has been held that deleted words form no part of a contract and cannot be used in construing it,⁴ but Scrutton⁵ doubts this as it is not clear why an "erasure" is not a surrounding circumstance which may be looked at, and there are authorities for the opposite view.⁶

§ 56.
Unintelligi-
ble or
uncertain
documents.

An agreement, the terms of which are unintelligible⁷ or too vague,⁸ cannot be enforced, and no parol evidence can be given to explain or amend the contract if it has been reduced to writing.⁹ But it is otherwise if the uncertain part of the agreement can be separated from the substantial part thereof.¹⁰ And words grammatically meaningless may be found by the Jury to be used in a mercantile sense.¹¹

¹ *Doe v. Martin*, (1790) 4 Term. Rep. 89, 65, 66.

² *Coles v. Hulme*, (1828) 8 B. & C., 568 (pounds); *Phipps v. Tanner*, (1883) 5 C. & P. 488 (pounds); *Say and Seal's case*, (1711) 10 Mod. Rep. 4 (a proper name); *Mourmand v. Le Clair*, (1903) 2 K. B. 216; *Fowkes v. Manchester*, (1863) 8 B. & S. 917, 930.

³ *Furnivall v. Coombes*, 12 L. J. C. P. 265; *Cheshire Lines v. Lewis* 50 L. J. Q. B. 121; *Dudgeon v. Pembroke*, 2 Ap. Ca. 284, 46 L. J. Q. B. 409.

⁴ *Inglis v. Buttery*, (1878) 3 Ap. Ca. 552, 569, 576.

⁵ On Bills of Lading, 5th Ed 22.

⁶ *Baumvoll v. Gilchrest*, (1891) 2 Q. B. 310, (1898) A. C. p. 16; *Glynn v. Margetson*, (1892) 1 Q. B. 337, (1898) A. C. p. 357; *Rowland v. Wilson*, (1897) 2 Com. Cas. 198; see *Wyller v. Povak*, (1907) 12, Com. C. p. 320, 323.

⁷ Contract Act s. 29, Specific Relief Act s. 21: *Guthing v. Lynn*, 2 B. & Ad. 232; *Ex. p. Baxter*, (1892) 2 Q. B. 478 C. A. 61 L. J. Q. B. 836.

⁸ Contract Act s. 29, *Pearce v. Watts*, (1875) L. R. 20 Eq. 492, 44 L. J. Ch. 492; *Taylor v. Partington*, (1855) 7 De G. M. & G. 328 C. A.; *Deojit v. Pitambar*, (1876) 1 All. 275; *Carter v. The Agra Savings Bank*, (1888) 5 A. 562; see *Douglas v. Baynes*, (1908) 78 L. J. P. C. 18; *Ramasami v. Rajagopala*, (1887) 11 M. 200; cf. *Bourne v. Seymour*, (1855) 16 C. B. 337, 24 L. J. C. P. 202, 207.

⁹ Evidence Act, ss. 94-97. This is so even if the defendant is responsible for the ambiguity; *Douglas v. Baynes*, (1908) A. C. p. 485.

¹⁰ *Guthing v. Lynn*, (1831) 2 B. & Ad. 232.

¹¹ *Ashford v. Redford*, (1873) L. R. 9 C. P. 20.

A contract is not necessarily void because it is open to more than one construction.¹ In India under section 29 of the Contract Act, agreements the meaning of which is not certain or capable of being made certain are void.² The decisions have not been illuminating.³ § 56.

In America an agreement to furnish oil "on terms so favourable that the buyer can compete with other parties in the same territory" was held to be too indefinite⁴; and a letter stating 'A' would want a certain amount of glass during the year, may be more, if less he would take the amount later, to which 'B' answered that the order was entered and he hoped there would be no trouble in giving them all they wanted, was held to be too uncertain to make a contract.⁵ American cases. Too indefinite.

Contracts are indivisible when the consideration is one and entire or where it is stated or can be gathered by necessary implication that no consideration is to pass from one party to the other until the whole of the obligations of the other party have been completed.⁶ It depends on the terms of the contract whether the performance can be divided⁷; but where no such intention can be gathered and the contract resolves itself into a number of considerations for a number of acts, as § 57.
Entire and divisible.

¹ *Wade v. Robert Arthur Theatre Co.*, (1907) 24 T. L. R. 77.

² See Specific Relief Act s. 21.

³ *Deojit v. Pitambar*, (1876) 1 A. 275 (bond over property. too vague); *Carter v. Agra Savings Bank*, (1883) 5 A. 562 (promise to pay so much every month, too vague); *Ramasami v. Rajagopala*, (1887) 11 M. 200 (rent at any rate the landlord fixed, too vague), cf. *Asan Kuthu v. Ramanathan*, (1898) 22 M. 26, see as to price to be fixed by third parties, § 581; *Baldeo Parshad v. Miller*, (1904) 31 C. 667 (all the indigo to be made in a factory, sufficiently certain).

⁴ *Marble v. Standard Oil Co.* 43 N. E. 783.

⁵ *Sidney Glass Works v. Barnes*, 86 Han. 374.

⁶ *Bates v. Hudson*, (1825) 6 Dow. & Ry. 3 (agreement to cure all or none of a flock of sheep); *Adlard v. Booth*, (1835) 7 C. & P. 108; *Cutter v. Powell*, (1795) 6 Term. Rep. 820; *Whitcher v. Hall*, (1826) 5 B. & C. 269; *Hopkins v. Prescott*, (1847) 4 C. B. 578; *Savage v. Canning*, (1867) 16 W.R. 133 (C.P. Ir.); *Charter v. Beckett*, (1797) 7. Term. Rep. 201; for ⁶ 'Instalment Contracts' see § 584.

⁷ *G. C. Simson v. Gora Chand Dass*, 9 C 473 (1883).

§ 57. in the case of periodical payments for a number of services which do not form one complete whole, the contract is divisible.¹

Partly void. If the consideration expressed is divisible and partly void for uncertainty or any other reason, save illegality, it may be so far rejected and the promise supported by so much as is valid and substantial.² If the consideration is illegal it generally renders the whole contract void according to English law, and always in Indian law.³ But if the promise is divisible and apportionable to several parts of the consideration, the promise so far as not attributable to the illegal consideration may be valid.⁴

**§ 58.
Joint or
several.**

Under the English law whether a contract is to be construed as joint or several or joint and several, depends on the intention ascertained by the ordinary rules of interpretation, as gathered from the whole contract considered in the light of the surrounding circumstances; and there is no equitable rule that a joint contract should be treated as joint and several.⁵ But these rules have been materially altered by the Contract Act, sections 42, 43, which have adopted the exception to the rule in England with respect to partners.⁶ The presumption is that all joint contracts are joint and several⁷ and there is no right given to one partner to insist on being sued along with his co-partners.⁸

¹ *Taylor v. Laird*, (1856) 1 H & N 208 (engagement for fixed period at so much per month).

² *King v. Sears*, (1835) 4 L. J. Ex. 181.

³ Contract Act s. 24.

⁴ *Shackell v. Rosier*, 5 L.J. C. P. 193; *Kearney v. Whitehavin*, (1893) 1 Q.B. 700 62 L.J. M. C. 129; *Bombay Ice Co. v. Fraser*, (1903) 6 Bom L.R. 23 O.C. (but this case was merely partly void as in restraint of trade). Contract Act 57, 58, and see § 111.

⁵ *Lee v. Nixon*, (1834) 1 Ad. & El. 201; *Collins v. Prosser*, (1838)

1 B. & C. 682; *Fell v. Goslin*, (1852) 21 L.J. Ex. 145.

⁶ *Kendall v. Hamilton*, (1879) 4 App. Cas. 504, 521, *secus* as to the assets of a deceased partner; see *Cooke v. Seeley*, (1848) 2 Exch. 746; see English Partnership Act s. 9 based on *Kendall v. Hamilton*; (1879) 4 App. Cas. 504 H.L.

⁷ *Lukmidas v. Purshotam*, (1892) 6 B. 700, 701; *Motilal v. Ghellabhai*, (1892) 17 B. 6, 11.

⁸ *Hemendro C. Mullick v. Rajendrolall*, (1878) 3 C. 353, 360; *Muhammad Ashari v. Radhe*, (1900) 22 A. 307, 315; *Dick v. Dhunji*, (1901) 25 B. 378, 386.

It has been held in India that an unsatisfied decree against one of several joint makers of a promissory note is a bar to a subsequent suit against the others,¹ following *King v. Hoare*,² but the Allahabad Courts considered that the rule on *King v. Hoare* does not apply to India.³ The Bombay Courts follow *King v. Hoare*.⁴

§ 58.

The rules as to the admission of parol evidence in respect to written contracts are laid down in the Evidence Act, and are beyond the scope of those lectures. But the following points are to be noticed in connection with mercantile contracts. Parol evidence is excluded in reference to terms implied by law with regard to which the document is silent.⁵ A written contract for the sale of goods expressing no time for payment or delivery, and therefore importing by construction of law a sale for ready money, does not admit of evidence of credit given, except under a general usage of trade.⁶ So a written contract expressing no time for delivery of the goods by the seller, or for the removal by the buyer, imports a reasonable time, and parol evidence to the contrary is inadmissible.⁷ And if goods are bought in a shop to be paid for on being sent home, the property does not pass

§ 59.
Parol evidence.

¹ *Hemendro C. Mullick v. Rajendrolall*, (1878) 3 C. 353; *Gurusami Chetti v. Samurti*, (1881) 5 M. 37.

² (1844) 67 R.R. 694; 13 M. & W. 494.

³ *Muhammad Ashari v. Radhe-Ram Sing*, (1900) 22 A. 307 dissenting from the previous cases.

⁴ *Lukmidas Khimji v. Purshotam*, (1892) 6 B. 700; see too *Lakshmishankar v. Vishnuram*, (1899) 24 B. 77; the point was left open in *Dick v. Dhunji*, (1901) 25 B. 378.

⁵ *Evans v. Roe*, (1872) L.R. 7 C.P. 138. (A written agreement

for hire at a weekly wage; evidence of conversations to show the term was a year inadmissible.) *Ford v. Yates* (1841) 2 Mann. and G. 549. (Contract silent as to credit evidence of course of dealing to show 6 months' credit allowed inadmissible), but see *Lockett v. Nicklin*, (1848) 2 Exch. 93; *Rich, v. Jackson*, (1794) Bro. C. C. 514.

⁶ *Ford v. Yates*, 10 L.J. C.P. 117; (see *Burges v. Wickham*, 33 L.J. Q.B. 17) for cases of usage see *Brown v. Byrne*, 28 L.J. Q.B. 313; *Falkner v. Earle*, 32 L.J. Q.B. 124.

⁷ *Greaves v. Ashlin*, 3 Camp. 424.

§ 59. until delivery.¹ For if the goods are to be delivered in a particular place, the property remains with the buyer until delivery.² Evidence of surrounding circumstances may be given to show that representations in letters forming a contract, which might be construed as warranties, were not intended as such.³

Lost
document.
Deciphering.
Surrounding
circum-
stances.

Oral.

In certain cases the meaning of the words used in a contract is a question of fact, and if it is necessary to consider the surrounding circumstances, those are questions of fact.⁴ The rule applies if the document is lost and secondary evidence is given.⁵ The Court must decipher badly written words.⁶ Evidence of the surrounding circumstances can only be given to explain and not to vary the words of the contract.⁷ When the contract is oral or to be inferred from a series of acts and things done in the course of which letters are written, but the contract does not depend solely upon the letters, it is a question of fact what the real contract is.⁸

§ 60.
Escrow.

Generally it is a question of fact whether an instrument was delivered as an escrow,⁹ but it is a question of law if the instrument is sent under a covering letter.¹⁰ The circumstances relied on to show delivery as an

¹ L. Sm. L.C., 9th Ed. 166; cited in *Bengamin*, 5th Ed. 322; see under s. 78, § 158; cf. *The Calcutta Co. v. DeMattos*, 32 L.J. Q.B. 385.

² *The Badische v. The Basle Works*, (1898) A.C. 207.

³ *Stucky v. Baily*, (1862) 1 H. and C. 405.

⁴ *Bowes v. Shand*, (1877) 2 App. Cas. 455 (followed in *I. G. Smith v. Ludha Ghella*, (1892) 17 B. 129; *Simpson v. Margetson* (1847) 11 Q. B. 23; *Robey v. Arnold*, (1898) 14 T. L. R. 220 C. A.; *Lyle v. Richards*, (1866) L. R. 1. H. L. 222 *George D. Emery v. Wells*, (1906) A. C. 515 P. C.

⁵ *Berwick v. Horsfall*, (1858) 4 C. B. (N. S.) 450, 27 L. J. C. P. 198.

⁶ *R. v. Huchs*, (1816) 1 Stark. 521.

⁷ *Mumford v. Gething*, (1859) 7 C. B. N. S. p 321; *Carr v. Montefiore*, (1864) 5 B. & S. 408 Ex.Ch.; *Macdonald v. Longbottom*, (1859) 1 E. and E. 977; Evidence Act s. 92.

⁸ *Long v. Millar*, (1879) 4 C. P. D. 450 C. A.

⁹ *Whelan v. Palmer*, (1888) 39 Ch. D. p 655; 57 L. J. Ch. 784.

¹⁰ *Furness v. Meek*, (1857) 27 L. J. Ex. 34, 37; see § 38.

escrow must be prior to or contemporaneous with and not subsequent to the delivery.¹ § 60.

Parol evidence may be given to show that the parties never intended to contract.² It is always a question of fact whether a particular document was intended to express the terms of the contract between the parties;³ or was signed subject to a condition,⁴ and facts may be proved which would invalidate a document or entitle any person to a decree or order relating thereto.⁵ § 61.
Intention not to make a contract.

If a document is partly written in pencil or altered in pencil, a preliminary question may arise as to whether the part capable of obliteration was intended to remain as part of the document or was merely a matter for deliberation.⁶ So, too, the intention with which one or other party signed the document,⁷ is a question of fact to be decided on consideration of all the circumstances of the case and evidence may be given to show that a party signing

¹ *Doc. d. Lloyd v. Bennett*, (1837) 8 Car. & P. 124.

² *Pattle v. Hornebrooke*, (1897) 1 Ch. 25 (not to be bound unless satisfied as to the plaintiff's responsibility); *Clever v. Kirkman*, (1875) 38 L. T. 472; *Lewis v. Brass*, (1877) 3 Q. B. D. 667; *Hussey v. Horne Payne*, (1879) 4 App. Cas. 311, 323. So too that B. & S. notes were only a colorable transaction; *Rogers v. Hadley*, (1863) 2 H. & C. 227. So in England a pretended sale to avoid execution: *Bowes v. Foster*, (1858) 2 H. & N. 779.

³ *Allen v. Pink*, (1888) 4 M. & W. 140 (receipt for sale, held not to exclude warranty); *Moore v. Campbell*, (1854) 10 Ex. 323 (whether B. & S. notes intended to express the contract); *Jones v. Littleddale*, (1837) 1 Nev. & P. K. B. 677 (Invoice by auction brokers); *Holding v. Elliott*, (1860)

5 H. & N. 117; *Long v. Millar*, (1879) 4 C. P. D. 450 C. A.; *Wake v. Harrop*, (1861) 30 L.J. Ex. p. 277, 31 L. J. Ex. 451; *Wace v. Allen*, (1889) 128 U. S. 590.

⁴ *Lindley v. Lacey*, 34 L. J. C. P. 7; *Pattle v. Hornebrook*, (1897) 1 Ch. 25; *Bell v. Ingestre*, 12 Q. B. 317; *Morgan v. Griffiths*, (1871) L. R. 6 Ex. 70; see § 507.

⁵ *Abaji Annaji v. Laxman*, (1906) 30 B. 426, Ch. Act. s. 94.

⁶ *Francis v. Grover*, 5 Hare 39; *Lucas v. James*, 7 Hare 410, 18 L. J. Ch. 329; *Re Adams*, (1872) 41 L. J. P. 31.

⁷ *Latch v. Wedlake*, (1840) 11 Ad. & El. 959 (whether two partners signed with intention to be bound only if a third signed); *Young v. Schuler*, (1853) 11 Q.B.D. 651 C. A. (agent signed as surety for principal); see as to 'Escrows' § 60.

- § 61. a document was misled into believing it was of a different character, even if he could have discovered the fraud.¹

Date.

Parol evidence is admissible to prove that the true date of the execution of a written agreement though it purports to have been executed on some other date;² or when two or more documents are executed on the same date to show in what order they were executed.³

§ 62.
Ways of
adding an
unexpressed
term to
a written
contract.

There are three ways only in which a provision not expressed in a written document can be added to it.⁴ The first is where the words used are elliptical; the second is usage, including in that term the law merchant, whereby under certain limitations terms may be added to or phrases may be explained and construed in a written document; and the third is by necessary implication as explained in the *Moorcock*⁵ and *Hamlyn v. Wood*.⁶ An express contract covering the entire matter always excludes any implied contract as to the same matter,⁷ and express warranties are never extended by implication.⁸ Nor can there be an implied contract where an express contract would contravene a statute,⁹ or in the face of an express refusal and protest as to the act contemplated.¹⁰

Implied
terms.

But in construing a contract, a term or condition not expressly stated may under certain circumstances be implied by the Court¹¹ if it is clear from that nature of

¹ *Carlisle v. Bragg*, (1911) 1. K.B. 489 C.A., explaining *Foster v. Mackinnon*, (1869) 38 L.J. C. P. 310; *Lewis v. Clay*, (1897) 67 L.J. Q.B. 224.

² *Hall v. Cazenove*, (1804) 4 East. 477; *Steele v. Mart*, (1825) 4 B. & C. 272.

³ *Gartside v. Silkstone*, (1882) 21 Ch. D. 762.

⁴ *Biddell v. Clemens*, (1911) 1. K.B. 934 C. A.

⁵ (1889) 14 P. D. 64.

⁶ (1891) 2 Q. B. 458, 491.

⁷ *Broughton v. B.*, 111 Mich. 26.

⁸ *Dickson v. Zizania*, 20 L. J. C. P. 73.

⁹ *Affeld v. Detroit*, 112 Mich. 560.

¹⁰ *Crane v. Bellows*, 177 Mich. 482.

¹¹ *Morgan v. Ravey*, (1861) 6 H. & N. 265 (inn-keeper impliedly promises to keep safely). *Ex. p. Ford*, (1885) 16 Q. B. D. 305 p. 307 (promise of indemnity inferred).

§ 62.

the transaction or from something actually found in that document that the contracting parties must have intended such a term or condition to be a part of the agreement between them.¹ Such an implication must in all cases be founded on the presumed intention of the parties and upon reason,² and will only be made when it is necessary in order to give the transaction that efficacy that both parties must have intended it to have³ and to prevent such failure of consideration as could not have been within the contemplation of the parties.⁴ If there is any reasonable doubt whether the parties did intend to enter into such a contract as is sought to be enforced, the document should be looked at and all the surrounding circumstances considered, and if the document is silent and there is no bad faith on the part of the alleged promisee the Court ought to be extremely careful how it implies a term.⁵ It is not enough to say that it would be reasonable to make a particular implication, for a stipulation ought not to be imported into a written contract unless on considering the whole matter in a reasonable and businesslike manner an implication necessarily arises that the parties must have intended that there should be the suggested term.⁶ The Court must clearly see that the term must necessarily have been the intention of both parties. If the contract is effective without the suggested

¹ *M. Ry. Co v. L & N. W.* (1866) 15 L. T. 264.; *Hamlyn v. Wood*, (1891) 2 Q. B. 488 C. A. (a continuing contract to sell all grains made, did not imply that business would continue until end of the term); *Douglas v. Baynes* (1908) 78 L. J. P. C. 13 p 15.

² *The Moorcock*, (1889) 14 P. D. 64 C.A. (Contract for use of a dock implies representation that it is safe.)

³ *Ibid.* *Lamb v. Evan.* (1893) 1

Ch. 218 C. A. ; *Nicoll v. Ashton*, (1901) 2 K. B. 126 C. A.

⁴ *The Moorcock*, (1889) 14 P.D. 64.

⁵ *Re Railway and Electric Appliances Co.*, (1888) 38 Ch. D. 597, 608. (On sale of patent no implied covenant to keep alive.) *Douglas v. Baynes*, (1908) 78 L.J (P.C.) 13

⁶ *Hamlyn v. Wood*, (1891) 2 Q. B. 488 C. A. 491.; *Sanders v. McLean* ; 52 L.J. Q B. 481, 11. Q. B D. 336.

§ 62.

term and is capable of being fulfilled as it stands, an implication ought not to be made.¹ The Privy Council² held that Court will not imply any term unless it is necessarily driven to the conclusion that it must be implied, which is a more stringent view than that taken in the *Moorcock* and cited with approval in *Consolidated Goldfields v. Spiegel*.³ But when the provisions of the contract are only explicable on a certain assumption the contract be read to include that assumption.³ And when a contract expressed in writing would not carry out the intention of the parties, the law will imply any term obviously intended by them which is necessary to make that contract effectual.⁴ For there is a well known rule that when the contract as expressed in writing would be futile and would not carry out the intention of the parties the law will imply any term obviously intended by the parties which is necessary to make the contract effectual⁴.

§ 63.
When the continuance of a state of facts may be an implied term.

If a party enters into an agreement which can only take effect by the continuance of a certain existing state of circumstances there is an implied engagement on his part that he will do nothing of his own motion to put an end to that state of circumstances.⁵ A mere agreement however to employ as an agent imports no agreement to continue business.⁶ For in a mere contract to employ,

¹ *Consolidated Goldfields v. Spiegel*, (1909) 25 T. L. R. 275, 277.

² *Douglas v. Baynes*, (1908) 78 L. J. P. C. p 15, citing *Hamlyn v. Wood*, (1911) 2 Q. B. 488 C. A.

³ *The Dominion Coal Co. v. The Dominion Iron Co.*, (1909) 25 T. L. R. 309, 313.

⁴ *Oriental Steamship Co. v. Taylor*, (1893) 2 Q. B. 518, 527 C. A. 529, 63 L. J. Q. B. 128, followed in *Holford v. Acton*, (1898)

2 Ch. 240, 67 L. J. Ch. 634; see too *Hudson v. Crittys*, (1896) 1 Ch. 265, 65 L. J. Ch. 328.

⁵ *Stirling v. Mailland*, (1864) 34 L. J. Q. B. 1; *McIntyre v. Belcher*, (1863) 32 L. J. C. P. 254; *Hamlyn v. Wood*, (1891) 2 Q. B. 488, 60 L. J. Q. B. 734; *Ogdens v. Nelson*, (1904) 2 K. B. 410 C. A.

⁶ *Rhodes v. Forwood* (1876), 1 App. Cas. 254, 47 L. J. Ex. 396; but see *Turner v. Goldsmith*, (1891) 1 Q. B. 544, 60 L. J. Q. B. 247.

no such term is imported, but if the contract is one of service, the commission to take the place of salary, then such a term is implied.¹ So where workmen were employed on piecework under a contract which provided for 28 days' notice before discharge, it was held that there was an implied term that the employers would provide a reasonable amount of work for the workmen up to the expiration of the notice, and such implication was not affected by the fact that the employers were unable to carry on their business at a profit, though that obligation might be subject to such things as breakdowns.²

The principle is that "where the consideration which one party is to receive depends on the other party continuing in the same condition, there is an implied obligation on the part of the latter to keep in existence the conditions out of which his ability to make a return for the benefit received by him arises".³ So there may be an implied condition that a named ship should continue to exist as a cargo-carrying vessel,⁴ and under the Contract Act, section 56, there is an implied condition that if the contract becomes impossible it shall be void.

It is a general rule of construction that terms of a written instrument which import that parties have agreed upon certain things being done have the same effect as expressed promises by the respective parties to do all such things as are necessary to carry out the agreement according to the expressed or manifest intention.⁵ This

Words
importing
agreements.

¹ *Northey v. Trevillion*, (1902) 18 T. L. R. 648.

² *Devonald v. Rosser*, 75 L. J. K.B. 688, (1906) 2 K. B. 728, 95 L. T. 232, 22 T. L. R. 682 C. A. citing the *Moorcock*.

³ *Ogdens v. Nelson*, (1904) 2 K. B. p. 418; see *Telegraph Despatch Co. v. McLean*, (1873) 8 Ch. Ap. 658 C. A.; *Bovine v. Dent*, (1904) 21 T. L. R. 82.

⁴ *Nicholl v. Ashton*; 17 T. L. R. 467 C. A., (1901) 2 K. B. 126.

⁵ *McIntyre v. Belcher*, (1868) 14 C. B. N. S. 654 (an agreement to sell a goodwill for a certain proportion of the earnings for a fixed period imports a promise to carry on the business for that period and not prevent the receipt of earnings). See *Ogdens v. Nelson*, (1905) A. C. 109. (Where the contract was express.) *Re City of Dublin Steam Packet Co.*, (1908) 24 T. L. R. 798 C. A. (A contract for carriage of mails imports a promise to allow facilities.)

§ 63. rule does not seem to be affected by section 67 of the Contract Act, for that provides that if the promisee refuses or neglects to afford the promisor reasonable facilities for the performance of his promise, the promisor is excused by such neglect or refusal as to any non-performance caused thereby. And this does not exclude any Common Law right to enforce an implied promise to give such facilities.¹ When ² buyers undertook to receive oil from the ship through their pipe lines at the discharging berth, and neither party knew, though they might have done so, that the ship could not come alongside without dredging operations, it was held that the buyers undertook to procure for the seller that right to have the steamer at the berth for the purpose of discharging there, and therefore must pay the dredging charges. Channel, J., held that no undertaking that the performance of the contract was possible could be implied. For in *Thorn v. Mayor of London*,³ it was held that there was no implied undertaking that the plans of Blackfriars Bridge could be carried out though there the plans were prepared by a well known architect in whom both parties might be thought to place equal reliance. When words of recital or reference manifest in clear intention that the party should do certain act, the Courts inferred a covenant to do such act.⁴ But it is a manifest extension of the principle to hold that where parties had expressly covenanted to perform certain acts, they must be held to have impliedly covenanted for any act convenient or even necessary for the perfect performance of these express covenants. He thought it was going too far to imply that the buyers undertook that the vessel

No implied term that contract is possible.

¹ See for principle *P. R. & Co. v. Bhagwandas*, (1909) 34 B. 192 C. A.

² In the matter of an arbitration between The Shell Co. and the Consolidated Pol. Co., (1904)

20 T. L. R. 517 O. C.

³ 1 App. Cas. 120, but see Contract Act s. 58.

⁴ *Aspedon v. Auston*, 5 Q. B. 671, 683.

could lie alongside in safety. He would hesitate if there was something at the bottom of the berth to imply such an undertaking. In the *Moorcock* the warranty implied was not that the berth was safe but that the wharf owners had taken all reasonable steps to ascertain that it was safe. But the purchasers undertook to allow the ship to come alongside and if the dredging was necessary in order to get the dockowners' consent to the ship going there, then it was necessary in order to enable the buyers to fulfil their undertaking. His Lordship therefore implied an undertaking that the ship should have a right to come to the berth. In England a term that the contract is possible and will remain so is implied if the contract is made as to a specific subject matter which the parties assume exists or will continue to exist or will be produced,¹ or on the assumption that an event or state of things assumed as the foundation of the contract will occur or continue.² But the general rule is that an absolute promise to perform is not excused by supervening or initial impossibility. As to where in England there is as implied condition that on a subsequent event making the contract impossible, the contract is discharged, see *Nicholl v. Ashlin*.³ In India the law implies such a condition by section 56 of the Contract Act.⁴

§ 63.

Implied term
that contract
possible.

In every case the question whether an implication ought or ought not to be made will depend on the particular facts, consequently it is neither possible nor desirable to lay down hard and fast rules, and the decision in one case is of little assistance in another unless the facts are practically

No fixed
rules.

¹ *Taylor v. Caldwell*, (1863) 3 B. & S. 826; *Howell v. Coupland*, (1876) 1 Q. B. D. 258, distinguished in *Ashmore v. Cox*, (1898) 4 Com. Cas. 48.

² *Krell v. Henry*, (1903) 2 K.B. 740.

³ (1900) 2 Q. B. 298.

⁴ See §§ 572, 573.

§ 63. identical,¹ and in dealing with a contract it is difficult to get light from other cases decided on other forms of contract.²

§ 64.
Require-
ments of
Common
Law.

The requirements of the Common Law of England cannot be imported into the construction of contract made in this country unless such requirements have been incorporated into the law of this country by legislative enactment, or well established judicial usage or unless it is clear from the construction of the contract that the parties when they entered into it had those requirements in view and intended that the contract should be controlled by them.³ But Common Law remedies are not to be excluded except under express enactments.⁴

§ 65.
Particular
words and
phrases.

Particular words and phrases have been judicially construed and although such decisions are generally speaking not authorities, except on precisely similar facts, yet the interpretation given by the Court to commercial terms may have induced the parties to use them and hence afford an indication of the intention with which they were used.⁵

§ 66.
Reasonable
time.

Jenkins, C. J., in considering whether reasonable notice had been given under the terms of a contract said: "It might have been physically possible for the defendants to carry out the order but it would clearly have required an effort which the plaintiff had no right to demand. I do

¹ *The Moorcock*, (1889) 14 P. D. 64 C. A.; *Hamlyn v. Wood*, (1891) 2 Q. B. 488 A. C.; *The Bearn*, (1906) P. 48 C. A. (implied representation that a ship can safely berth at a dock). See for instances in commercial cases: *Re Anglesey, Wilmot v. Gardun*, (1901) 2 Ch. 549 C. A. (interest implied from course of delivery); *Stirling v. Maitland*, (1864) 5 B. & S. 840. (No implication has been held to arise that orders will be given from a contract as to rates). *R. v. Demers*,

(1900) A. C. 103 P. C. (or from a contract to carry mails that the contractor shall be employed); *Churchward v. R.* (1865) L. R. 1 Q. B. 173.

² *Ogdens v. Nelson*, (1905) A. C. p. 11.

³ *G. E. Hotel Co. v. Collector of Allahabad*; 2 Agra Ex. O. C. 1 (release); *Ramgopal Mookerjee v. Massey*, 8 Moo. I. A. p. 259.

⁴ *P. R. & Co. v. Bhagwandas*, (1909) 34 B. 192 C. A.

⁵ See § 35.

not think that a notice involving such an effort from business men with innumerable other matters to attend to can be held to be such a reasonable notice as was intended by both parties when the document was given."¹ What is reasonable time depends on the facts of each case.²

§ 66.

It had been held in Calcutta that the term "month" in a contract means in India as in England³ a lunar month and not a calendar month.⁴ But the meaning of the word may be determined by trade usage,⁵ and the circumstances may show what was meant.⁶

§ 67.
Time—
month.

"On seven days notice from the buyer" means the buyer has the right to fix the date and that the sellers are bound to deliver accordingly, if they do not, the buyer may rescind.⁷

In calculating time the first day is excluded if time starts from a particular day.⁸

Calculation
of time.

If the contract is to do something within a given time it depends on the context whether the first or last day is to be excluded;⁹ but in general the last day is included.¹⁰

In India where there is no fixed mean time apparently time must be considered to mean, unless it is otherwise specially stated, the mean time of the locus contractus.¹¹

Mean time.

¹ *Bengal Coal Co. v. Homee*, (1899) 24 B. p. 104 A. C., and see Contract Act s. 44.

² Contract Act s. 44 *Cosim Hossein Soortu v. Lee Phee Chuan*, (1880) 5 C. 477 A. C., citing *Wright v. New Zealand*, L. R. 4 Exch. Div. 165.

³ This was not so in London, *Benj.*, 5th Ed. 681. The Sale of Goods Act enacts by s. 10 (2) that *prima facie* it means a calendar month.

⁴ *South British Fire Co. v. Projo Nath Saha*, (1909) 36 C. 516 C. A. 13 C. W. N. 425.

⁵ *Bissell v. Beard*, (1873) 28 L. T. 740.

⁶ *Bruner v. Moore*, (1904) 1 Ch. 305.

⁷ *Juggernath Khan v. Mac-lachlan*, (1881) 6 C. 681; *Fleming v. Kogler*, (1878) 4 C. 287.

⁸ *Mercantile Marine Insurance v. Titherington* 34 L. J. Q. B. 11. S. of G. Act s. 10.

⁹ *Pugh v. Leeds*, Cowp. 714; see as to Bills of Exchange English Act, ss. 14 and 92.

¹⁰ *Isaac v. Royal Insurance, L. R. 5 Ex. 296*, 39 L. J., Ex. 189; *Backhouse v. Mellor*, 28 L. J. Ex. 141.

¹¹ Cf. the provision in England, 48 & 44 Vict. C. 9 s. 1.—(time means in England, English mean time; in Ireland, Irish mean time).

§ 67.
Leap year.

The odd day in leap years was not a separate day, but was counted with the preceding day by a statute of 1256.¹ This was repealed in England in 1879,² but apparently is still in force in India in Presidency towns.

'Days' mean consecutive days including Sundays unless the contrary is expressed,³ or a usage to that effect is shown.⁴

If a certain number of days are allowed, the first day must be excluded.⁵

When the contract was for "delivering on April 17, complete 8th May" the Court was equally divided as to whether the vendor was bound to commence delivery on the 17th of April.⁶

Hours.

The Indian rule as to hours for delivery has been laid down in section 47 of the Contract Act which alters the Common Law rules.⁷ Performance must be at any time during the usual business hours on the day fixed and at the place agreed.

Under the Sale of Goods Act delivery must be made at a reasonable hour.⁸

When it is a question of priorities fractions of a day count.⁹

§ 68
Words of
estimation.

If the parties intend to sell by estimation only it is open to them to state that fact. The word "say" may be a word of some ambiguity. Where it was open to a party to state that he sold the entire stock of "about" 700/800 tons or by "estimate" or approximately, if he sell an

¹ See Benjamin, 5th Ed. p. 685, 40 H. III.

² 42 & 43 Vict. c. 59.

³ *Brown v. Johnson*, 10 M. & W. 331 (1842).

⁴ *Cochran v. Retberg*, 3 Esp. 121 (1803).

⁵ *Webb v. Fairmaner*, (1838) 3. M. & W. 473; Benjamin, 4th, 687.

⁶ *Coddington v. Paleologo*, (1867) L. R. 2 Ex. 193; *Berg-*

heim v. Blaenavon, (1875) L. R. 10 Q. B. 319.

⁷ *Startup v. Macdonald*, (1843) 6 M. & G. 592, 64 R. R. 810,— followed in India in 1869 in *Karticknath v. Government*, 11 W. R. 58 bench.

⁸ S. of G. Act. s 29 (4.)

⁹ *Tomlinson v. Bullock*, (1879) 4 Q. B. D. 230, 232.

entire stock 700/800 tons, as being say six or seven hundred tons, he contracts to sell 700/800.¹ § 68.

The word "say" has no special mercantile signification, and if it is alleged that it has it must be averred on the record. Generally it only means "that is to say."²

A contract to sell the entire cargo amounting to 900 tons or thereabouts, is not complied with if the cargo is of 2,147 tons.³ If a specific cargo is sold believed to be of a certain amount, the buyer must take it whatever it is.⁴

The word "or" is to be construed in its ordinary meaning unless the context or the facts to which the contract is applied require it to be construed as a conjunctive particle equivalent to "and" or as merely indentifying the connected terms.⁵

The word "upon" may mean before, simultaneously or "Upon." after, according to the context.⁶

For contracts F. O. B. and C. I. F. see under delivery.

Contracts negotiated through brokers are usually made by bought and sold notes. The note delivered to the seller is the sold note and the note delivered to the buyer the bought note. No particular form is required⁷ and from the cases it seems that there are three varieties used in practice.

F. O. B.
C. I. F.
§ 69.
**Bought and
sold notes.**

1. The first is where on the face of the note the broker professes to act for both the parties whose names are disclosed on the notes : both notes being signed by the broker.

¹ *Kallyanjee Shamjee v. T. C. Shorrocks*, (1910) 37 C. 334, but see § 279.

² *Leeming v. Snaith*, (1851) 16 Q.B.D. 275, Coleridge J. dissenting.

³ *C.H.B. Forbes v. Tullochchand*, 3 B. 386; *Borrowman v. Drayton*, L.R. 2 Ex. D. 15; *Kreuger v. Blanck*, (1869) L. R. 5. Ex. 179.

⁴ *Covas v. Bingham*, 23 L. J. Q. B. 26. For "about" see § 279.

⁵ *Bold v. Rayner*, 1 M. & W. 343, 5 L.J. Ex. 172; *Elliot v. Turner*, 2 C. B. 446; *Tielens v. Hooper*, 5 (1850) Ex. 830.

⁶ *Reg. v. Humphery*, 5 L. J. Q. B. 202.

⁷ *Durga Prosad v. Bhajan Lall*, 31 I.A. 122 P.C., 31 C. 614.

§ 69.

2. The second form is where the broker does not disclose on the bought note, the name of the seller, nor on the sold note the name of the buyer, but still shows that he is acting as broker not as principal. The form then is simply "Bought for A.B." and "Sold for C.D."

3. The third is when the broker on the face of the note appears to be the principal though he is really only an agent. By so doing he assumes the obligation of a principal and cannot escape responsibility by parol proof that he is only acting as broker for another¹; although the parties to whom he gives such a note are at liberty to show that there was an unnamed principal and to make this principal responsible.²

4. The fourth form is where the broker professes to sign as a broker but is really the principal, in which case his signature does not bind the other party and he cannot sue on the contract.³

In India it has generally been held that bought and sold notes, though not necessarily constituting the contract, do as a general rule constitute it.⁴

The forms of the notes may show that they were not intended to constitute the contract, but to give information from the broker to his principal of what he had done.⁵

The English cases turn largely on the requirements of the Statute of Frauds, in India a contract of sale may be proved by parol,⁶ and there may be a complete binding contract if the parties intend it although bought and sold notes are to be exchanged or a more formal contract is to be drawn up.⁷

¹ Contract Act, s. 230.

² Benjamin, 5th Ed. 251.

³ Contract Act s. 236. *Sharman v. Brandt*, (1871) L.R. 6 Q. B. 720 Ex. Ch.; *Robinson v. Mollett*, (1875) 7 H. L. 802.

⁴ Woodroffe on Evidence, 4th, 462, see Articles in 8 C.W.N. CCXXX, CCXXXVIII; as to the practice in England, see *Sieve-*

wright v. Archibald, 20 L.J. Q.B. 529.

⁵ *Clarton v. Shaw*, (1872) 9 B. L. R. 245.

⁶ *Jumna Das v. Srinath Roy*, 17 C. 177; *Durga Prosad v. Bhajan Lal*, (1904) 8 C.W.N. 489.

⁷ *Clarton v. Shaw*, (1872) 9 B. L. R. 245, 252.

When, however, bought and sold notes have been exchanged there have been conflicting decisions as to whether they constitute a contract in writing and to what extent if at all parol evidence is admissible of the terms of the contract.

In the latest Privy Council decision however it was held that they did not : their Lordships held that section 92 of the Evidence Act did not apply.¹

But if the notes agree and are delivered and accepted without objection, such acceptance without objection is evidence of mutual assent to the notes.²

A mistake in a sold note if it did not mislead the party can be shown and the real contract proved. So when the notes had been falsified by the defendant, the plaintiff was allowed to fall back on to the real contract.³

In an early Privy Council case⁴ it was held relying on a custom of the Calcutta market that the contract is contained in both the notes and not in one and if there is a material variation between them then there is no contract. But in a more recent case this was doubted,⁵ and in the last Privy Council ruling the case seems to have been regarded as of no authority.⁶

It would follow that the Bombay case is also over-ruled where it was held that unstamped bought and sold notes are inadmissible in evidence, and the contract cannot be

¹ *Durga Prosad v. Bhajan Lall*, (1904) 8. C. W. N., 489, 81C, 614, over-ruling according to Woodroffe on Evidence 4th Ed. 463; *Cowie v. Remfry*, (1846) 3 Moo. 1 A. 448; and *Ah Shain Shoke v. Moothia Chetty*, 4 C.W.N. 453, which was relied on in the Appeal Court but not referred to in the P.C. in *Durga Prosad v. Bhajan Lall*.

² *Sievwright v. Archibald*, 20 L. J. Q. B. 529.

³ *Mahomed Bhoy v. Chutterput Sing*, (1898) 20 C. 854, 857; *Durga Prosad Sureha v. Bhajan Lall Lohia*, 31 C. 614 P.C.

⁴ *Cowie v. Remfry*, (1846) 5 Moo. P.C. 237, citing *Thornton v. Kempster*, (1814) 5 Taunt. 796, 15 R. R 658, (Rega hemp and Petersburg, in respective notes).

⁵ *Jadu Roy v. Bhubotaran*, (1889), 17 C. 173 A. C.

⁶ *Durga Prosad v. Bhajan Lall*, (1904) 31, 1 A. 122.

§ 69. proved *aliunde*¹ except in cases of fraud. An admission before suit does not exempt the plaintiff from proving his case.¹

Under English law if bought and sold notes vary in any material particular, there is no contract,² as where the two notes varied in the description of the goods,³ or as to the mode of payment,⁴ but apparent variation⁵ may sometimes be reconciled by evidence of the mercantile usage by which the variance is shown to be immaterial.⁶ A difference as to the brokerage is a mere matter between the broker and the seller and is not material.⁶ In India the question would be whether there was a contract between the parties, *i.e.* were they *ad idem*, and parol evidence might be given on this point.

Lost. Where a contract provided that the seller's duty to deliver goods should be discharged if the vessel containing them should be lost, it was held 'lost' meant 'become unfit' for the purpose contemplated and a loss occurred when the ship actually became unfit, and not when she was abandoned.⁷

¹ *S. A. Ralli v. Caramalli*, (1890), 14 B. 102 A. C.

² *Grant v. Fletcher*, 5 B. & C. 436; *Sieversright v. Archibald*, 17 Q. B. 103, 20 L. J. Q. B. 529.

³ *Thornton v. Kempster*, 5 Taunt. 786

⁴ *Gregson v. Ruck*, 4 Q. B. 737.

⁵ *Bold v. Rayner*, (1836) 1 M. & W. 313, 5 L. J. Ex. 172.

⁶ *Kempson v. Boyle*, (1865) 34 L. J. Ex. 191; *Townend v. Drakeford* (1843) 1 Car. & K. 20.

⁷ *Nasservanji v. Khambatta*, (1888) 13 B. 15; *Dadubhai v. Khambatta*, (1897) 22 B. 195.

CHAPTER IV.

Trade Usages.

In addition to being subject to express enactments, Mercantile contracts are largely controlled by trade usages. A trade usage is merely a usage so general and well understood in fact with reference to the business, place and class of persons, that the parties are presumed to have made their contract with tacit reference to it and to have intended to be governed by it in the same way and to the same extent as other like persons in like cases.¹ A usage to be available must be some practice of merchants creating rights between the parties to a contract in respect of some matter which is not in terms provided for by the contract. It must be something more than a mere mode of carrying on business adopted with reference to the settlement of debts by payment or otherwise, something more than the usual mode of settling accounts.² Such a usage was formerly distinguished from the general custom of merchants which forms the law merchant. But as will be pointed out below, this doctrine has been exploded.

§ 70.
Nature of
usage.

More than
mere
practice
of merchants.

Law
Merchant.

It must however be distinguished³ from Common Law customs or general customs.⁴ Generally speaking, Common Law or general customs give rise to rights apart from contractual relationship ; whereas trade usages as a rule have force only in connection with contracts.⁵

§ 71.
Usages and
general
customs
disting-
guished.

¹ *Moult v. Halliday*, (1898) 1 Q. B. 180.

² *Meyer v. Dresser*, (1864) 16 C. B. N. S. 646, per Willes, J., p. 662, see para. 87.

³ *Dashwood v. Magniac*, (1891) 3 Ch. 306, 370.

⁴ See Broom's Commentaries.

⁵ *Daun v. City Brewery*, (1869) L. R. 8 Eq. 161. For a case of trade usage apart from a contract, see *Oppenheimer v. Attenborough*, (1908) 1 K.B. 221.

§ 71. This chapter is confined to usages in relation to mercantile contracts;¹ they differ from customs of the country in that they need not be immemorial,² not necessarily confined to a limited locality³ and however extensive, if contrary to positive law⁴ will not be sanctioned.⁵

§ 72.
Law
Merchant.

The Law Merchant like the Common Law is the offspring of custom: it is neither more nor less than the usage of merchants and traders in different departments of trade ratified by decisions of Courts of Law, which upon such usages being proved before them, have adopted them, or rather recognised them as settled law, with a view to the interests of trade and of the public convenience; the Courts proceeding herein, as was said in *Goodwin v. Robarts*,⁶ on the well known principle of law that with reference to transactions in different departments of trade, Courts of Law will, in giving effect to the custom and dealings of the parties, assume that the latter have dealt with each other on the footing of any custom or usage prevailing generally, or in that particular department. By this process what before was usage only, unsanctioned by legal decision, has become engrafted upon or incorporated with the Common Law.⁶ It was formerly considered, that the Law Merchant was fixed or stereotyped, and that although a particular custom of trade might grow up in modern times so as to annex incidents to contracts in particular localities or markets, that no general custom of merchants could now

Not
stereotyped.

¹ There are agricultural customs, and the subject is not confined to commercial transactions, *Smith v. Wilson*, (1832) 1 L. J. K. B. 194; *Hutton v. Warren*, (1836) 5 L. J. Ex. 234, 46 R. R. 368, and see for theatrical customs, *Grant v. Maddox*, (1848) 15 L. J. Ex. 104, 16 L. J. Ex. 227; *Cotton v. Sounes*, (1902) 18 T L.R. 456; for the nature of trade usages

see *Moult v. Halliday*, (1895) 1 Q. B. 125, 129; *Re North-West Rubber Co.*, (1908) 2 K. B. 907, 923.

² *Dashwood v. Magniac*, (1891) 3 Ch. 306, 370.

³ See § 85.

⁴ *Dashwood v. Magniac*, *supra* pp. 371, 372.

⁵ But see § 78.

⁶ (1875) 1 A. C. 476.

acquire recognition in the Courts of Law. But this doctrine has been exploded.¹ Although there is still a controversy on the point, the decided cases all support the view that a modern usage can still be recognised by the Courts of Law as being part of the Law Merchant, the question turns on the generality and not on the age of the usage. Had the former view prevailed it would have led to the anomaly that a usage admittedly binding as a particular or local usage, would on proof of its universal recognition among merchants have been held to be bad, that is to say that where a plaintiff proved a rule to be a recognised custom of a locality, his claim might be defeated on the defendants showing that it was not only a local custom, but a universal custom.² § 72.

Other instances of general usages of recent origin are the customs as to new for old in marine insurance,³ declarations under open policies,⁴ packer's general lien,⁵ (but this applies to England only), and negotiability of bearer debentures,⁶ and in Calcutta a custom for the property in unascertained goods to pass free of the seller's lien by endorsement of delivery orders.⁷ It seems that the distinguishing feature of the Law Merchant is that a term can be implied thereunder which the parties could not import into their contract by agreement. Modern instances.

It has been held in England that a usage, if it is to become part of the Law Merchant, must be of the whole country,⁸ and not of a particular locality, and must be Extent.

¹ See L. Q. R. Vol. 15 p. 130, 245; see § 78.

² See the remarks of the P. C. in *Irrawaddy S. N. Co. v. Bugwandas*, (1891) 18, 1 A. 121.

³ *Poingdes're v. Royal Ex. As. Co.*, (1826) 27 R. R. 759

⁴ *Stephens v. Australasian Ins. Co.*, (1872) 42 L. J. C. P. 12.

⁵ *In re Witt*, (1876) 45 L. J. Bh. 118.

⁶ *Goodwin v. Robarts*, (1875) 1 A. C. 476.

⁷ *Anglo India Jute Mills v. Omdemull*, (1910) 38 C. 132 C. A., sed quere whether the usage was sufficiently general.

⁸ In the *Laws of England* Vol. 10 p. 259 it is said that it must amount to *jus gentium* and must have received judicial sanction, but this probably refers to the ancient Law merchant, and obviously a custom must become part of the Law merchant to be judicially sanctioned as such.

§ 72. recognised by the commercial community in general and not merely by particular sections of it.¹ Thus the custom of London is not enough,² it must be shewn to exist in England, London and amongst English merchants.³ But even if only shewn to prevail in London⁴ or among members of the stock exchange,⁵ if there is no contrary evidence, a custom has been held to be established.⁶ Hence it seems that a custom of Calcutta⁷ or Bombay⁸ could not become part of the Law Merchant of India so as to give any document quasi negotiability. It does not follow that a document negotiable by the Law merchant of another country is so in England.⁹

§ 73.
Recognised
in India.

In India trade usages have been recognised by the Legislature. The Bills of Lading Act and the Carriers Act refer to the custom of merchants. The Contract Act provides for the recognition of such usages and the Evidence Act prescribed rules for their proof.

§ 74.
How far
evidence of
usage ad-
missible.

It has been said that how far evidence of usage is admissible where a mercantile contract has been reduced to writing, is a question which it would be difficult to answer with exactness or precision¹⁰; and it has been doubted whether the practice of admitting oral evidence in these cases has not been carried to an inconvenient length.¹¹

¹ *Easton v. London Joint Stock Bk.*, (1886) 34 Ch. D. p. 113; *Hathesing v. Laing*, (1873) 43 L.J. Ch. 233; *Gunn v. Bolckow*, (1875) 44 L. J. Ch. 732.

² *Partridge v. Bank of England*, (1846) 15 L. J. Q. B. 395; *Rickford v. Ridge*, (1810) 2 Camp. 537.

³ *Venables v. Baring*, (1892) 3 Ch. 527, 61 L. J. Ch. 609.

⁴ *Sheffield v. London J. S. Bk.*, (1888) 13 A. C. 333.

⁵ *Rumball v. Metro Bank*, (1877) 2 Q. B. D. 194.

⁶ *London Joint Stock Bk. v. Simmons*, (1891) 1 Ch. 270. (1892)

A. C. 201; *Bentinck v. London J. S. Bk.*, (1893) 2 Ch. 120.

⁷ But see *Anglo India Jute Mills v. Omademull*, (1910) 38 C. 172 C. A. (gunny trade).

⁸ But see *Jettmull v. B. B. & C. I. Ry.*, (1901) 3 Bom. L. R. 206.

⁹ *Picker v. London & Country Bank*, 18 Q. B. D. 515.

¹⁰ Per Tindal C. J. in *Whittaker v. Mason*, (1835) 2 Bing. N. C. p. 370. See too Roscoe's "Evidence," 18th Ed. Vol. I. p. 24.

¹¹ *Tancred v. Steel*, (1890) 15 A. C. 125; *Ex. p. Watkiss*, (1878) L. R. 8 Ch. 520; *Anderson v. Pitcher*, (1800) 2 B. and P. 168.

But the modern tendency in England is the other way,¹ and in India the Evidence Act has prescribed rules as to the admissibility of such evidence.² There appears to be no inclination to restrict such evidence at the present time, and in recent legislation in England an express proviso has been added to preserve such usages.³ § 74.

Trade usages may be either part of the Law Merchant, or may only prevail in particular localities, markets or trades. A commercial contract may on the face of it contain only certain stipulations, but any of the parties may seek to add some incident to it, as being a provision which was not mentioned because all the parties understood or ought to have understood that it was, according to the custom of the trade, a part and parcel of the contract. Merchants and traders with a multiplicity of transactions pressing upon them, and moving in a narrow circle and meeting each other daily, desire to write little and leave unwritten what they take for granted in every contract. In spite of the lamentations of Judges, they still continue to do so : and in the vast majority of cases of which the Courts of Law hear nothing, they do so, without loss or inconvenience : and upon the whole they find this mode of dealing advantageous even at the risk of occasional litigation. It is the business of the Courts reasonably so to shape their rules of evidence as to make them suitable to the habits of mankind, and such as are not likely to exclude the actual facts of the dealings between parties when they are to determine the controversies which grow out of them. It is only fair that the parties should be allowed to explain all the terms of their contract.⁴

§ 75.
Principle of
admission.

¹ *Buckle v. Knoop*, (1867) 36 L. J. Ex. 223; *Hutchinson v. Tatham*, (1873) 42 L. J. C. P. 260. and the Marine Insurance Act, 1904, s. 87.

⁴ As Campbell, C. J., put it in *Humphrey v. Dale*, (1857) 26 L. J. Q. B. 137.

² S. 92 Proviso 5.

³ See Sale of Goods Act, s. 53

**§ 76.
Two
classes of
cases.**

There are two classes of cases in which trade usages are admissible in evidence, the first in which it is sought to annex some incident to a contract, and the second in which evidence is given that some expression in a contract is used in its customary meaning or, as it has been expressed, a reference is sought to be made to the mercantile dictionary.¹

**§ 77.
Adding
incidents to
contracts
must
conform to
rules.**

As regards the first class of cases, the Courts have laid down various rules, to which a usage of trade must conform, if it is to be admissible in evidence. If a usage appears to be inconsistent with such rules, the Court may refuse to admit any evidence of it. But as was pointed out in *Whittaker v. Mason*,² it is not easy or in fact possible to state these rules with precision. This has not been made easier by the fact that in many judgments the Judges have enunciated the law in general terms which however true in the particular case, are by no means accurate expositions of the general law. A distinction must be drawn between cases where the party to be charged was aware of the usage, and cases where he was not, and he is accordingly sought to be bound on the principle that a man who makes a contract in a particular trade or market, must be taken to submit to the usages of that trade or market. A usage must be notorious, certain, reasonable and must not offend against the intention of any legislative enactment.

**§ 78.
Conformity
with law.**

It is not easy to say how far a usage must be consistent with the law. In the first place a distinction must be drawn between positive provisions of law and implications arising by law; there has also been some distinction drawn between particular and general usages.

¹ *Bowes v. Shand*, (1877) 2 A. C. 455. *taker v. Mason*, (1835) 2 Bing, N. C. p. 370.

² Per Tindal, C. J., in *Whit-*

As regards positive law, which includes law fixed by¹ statutes or decided cases, it has been held that custom cannot override the Limitation Act,² and Cockburn, C. J., said that to give effect to a usage which involves a defiance or disregard of the law would be obviously contrary to a fundamental principle,³ and in *Bundao v. Barnell*⁴ it was held that evidence of particular usages of merchants however extensive is not admissible to prove a custom contrary to the Law Merchant. There are dicta however to the effect that illegal customs do not bind unless known to the party to be charged and assented to by him,⁵ but there appears to be no authority that lays it down that an illegal custom is valid, save *Scymour v. Bridge*,⁶ in which it was held that a custom of the Stock Exchange to disregard Leeman's Act was binding on an outsider who contracted with knowledge of it. Under that Act, no transfer of bank shares is valid unless the numbers of the shares are inserted ; there is no penalty attached to a blank transfer save that the contract cannot be enforced. The London Stock Exchange agreed to disregard this Act, and in the above case the plaintiff, knowing of this custom, bought shares through a stock-broker, and was held bound to accept blank transfers. But this case although decided on a question of a custom, might be explained by the fact that the broker made himself liable for the shares at the request of the customer, and in any case the plaintiff obtained what he knew he had bargained for.

It has recently been held that evidence of a custom was inadmissible for the purpose of defeating the protection

¹ *Dashwood v. Magniac*, (1891) 3 Ch. p. 372.

² *Mohan Lal Jechand, v. Amrat Lal*, 3 B. 174.

³ *Goodwin v. Robarts*, (1875) L. R. 10 Ex. p. 387; *Neilson v. James*, (1882) 9 Q. B. D. 516, 551, 554.

⁴ (1846) 12 Cl. & Fin. 787 H. L.

⁵ Phipson on Evidence; *Harker v. Edwards*, 57 L. J. Q. B. 147 (1887).

⁶ (1884) 14 Q. B. D. 460, but see *Harker v. Edwards*, (1887) 57 L. J. Q. B. 147.

§ 78. which otherwise is, by Act of Parliament, given to a pledgee, but this was not a case of a contract to which it was sought to annex terms by usage, but the question was as to the customary authority of an agent.¹

General. On the other hand, Garth, C. J.,² referring to particular trade usages, observed that their very object is generally to modify or control the general law, but his impression was that no general usage or custom of trade, that is no usage or custom pervading all trades, inconsistent with the Contract Act, would be valid. The same view was expressed in *Meyer v. Dresser*.³

Law
Merchant.

But since the decision in *Goodwin v. Roberts* and the observations of the Privy Council in the *Irrawaddy S. N. Co. v. Bugwandas*,⁴ this distinction between general and particular customs is, it seems, unsound.

In *Crouch v. Credit Foncier*,⁵ it was held that an incident of a nature which the parties themselves were not competent to introduce by express stipulation, could not be annexed by the tacit stipulation arising from usage. But this case has been according to the better opinion, overruled, and it has been decided⁶ that a usage can become part of the law merchant and as such make an instrument negotiable—an incident which could not be stipulated for by the parties.

In recent English Acts⁷ a proviso has been inserted to the effect that a usage, if it be such as to bind both the parties to a contract, may negative or vary any right duty or liability which would arise under a contract by implication of law. Thus even where a sale is on credit,

¹ *Oppenheimer v. Attenborough*, (1908), I.K.B. 221 C. A.

² *Mothoora v. India G. S. N. Co.*, 10 C. 166 (F.B.); see *Atwood v. Sellar*, (1879) 4 Q. B. D. 342. cf. *Harker v. Edwards*, (1887) 57 L. J. Q. B. 147.

³ 16 C. B. N. S. 646.

⁴ 18 I.A. 189 and see *supra*.

⁵ (1873) L. R. 8 Q. B. 374.

⁶ *Bechuanaland E. Co. v. London Trading Co.*, (1898) 2 Q.B. 658.

⁷ See Sale of Goods Act, s. 55; Marine Insurance Act, s. 87.

evidence of a usage that delivery and payment are concurrent conditions is admissible.¹ § 78.

It would seem then that a usage cannot control the law, but it can negative or vary any implication arising by law, and that the view taken in *Crouch v. Credit Foncier* is sound save where a usage becomes incorporated with the law merchant. The observations of Garth, C. J., appear from the context to be with reference to implications arising by law, and the remarks in *Meyer v. Dresser* are *obiter dicta*. It would be strange if a trade usage could override the law, except the Indian Contract Act,² and that only because of an express provision to that effect.³ The distinction between the express provisions of the law and implications arising by law, appears to be the key to any apparent conflict of judicial opinion. Implications of law.

There is authority however that a custom may vary the law,⁴ but other decisions are against this view,⁵ as the American courts put it no custom can be proved if it is itself illegal. For this would be to permit parties to break the law because others had broken it; and then to found their rights upon their own wrong doing.⁶

Certain customs have been held to be invalid as being against the general law,⁶ but in view of the modern General law.

¹ *Field v. Lelean* (1861) 30 L. J. Ex. 168 overruling *Spartaki v. Beneche*, (1850) 19 L.J C.P. 298.

² Contract Act s. 1.

³ *Stewart v. West India Co.* (1873) L. R. 8 Q. B. 88, 362; *Harker v. Edwards*, (1887) 57 L. J. Q. B. 147, where it was said a custom was binding unless illegal, that is contrary to natural justice, and valid although not in accordance with the law.

⁴ *Dann v. City of London Brewery*, (1869) L. R. 8 Eq. 155, 161; *Dashwood v. Magniac*, (1891) 3 Ch. 306, 372; *Hathesing v. Laing*, (1878) L.R. 17 Ex. p. 92; see also *Turnbull v. Green*, (1868) 36 L. J. Ch. p. 334.

⁵ *Wallace v. Fouché*, 27 Mass. 266.

⁶ *Potter v. Pearson*, (1702) 1 Salk. 129 (custom that pro-note without consideration was valid in London); *Clarke v. Martin*, (1702) 2 Ld. Raym. 757 (custom that pro-note payable to order is negotiable held invalid); *Hawkins v. Cardec*, (1688) 1 Salk. 65 (custom of endorsement as to part of bill held invalid); *Atwood v. Sellar*, (1879) 5 Q. B. D. 286 (average adjustment); *Meyer v. Dresser*, (1864) 33 L. J. C. P. 289; see *Suse v. Pompe*, (1860) 30 L. J. C. P. 75; see *Willans v. Ayres*, (1877) 3 A. C. p. 145 (custom to fix damages held good).

§ 79.

decisions the principle of exclusion in so far as the general law includes the Law Merchant, must be considered as no longer applicable. In America it has been held that where the law does not imply a warranty,¹ a trade usage cannot do so, but the Contract Act, section 110, lays down a different rule for India.

Not invalid
because it
differs from
the Common
Law.

It is suggested² that customs are not invalid because they differ from the Common Law, and the cases against this view³ are explained as being instances of unreasonable customs. In one case after stating that a custom cannot override the plain well established law the Court added that the custom was against common sense.⁴ But it seems that a custom cannot add an incident which the parties themselves could not expressly add to their contract, save when the custom becomes part of the Law Merchant, whether that incident is against the Common Law or in opposition to a statute.

§ 79.
Consistent
with the
Contract.

It follows from the principle on which evidence of usages is admitted that such usages must be consistent with the expressed⁵ terms of the contract⁶ and the terms sought to be added must be incidental to those expressed in the written contract.⁷ For it depends on the implied agreement of the parties.⁸ The Evidence Act provides that any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved ; provided that the annexing of such an incident would not be

¹ *Barnard v. Kellogg*, (1870) 10 Wall. 383.

² *Aske on Custom and Trade Usage*, p. 179.

³ *Magee v. Atkinson*, (1837) 6 L. J. Ex. 115; *Humphrey v. Lucas*, (1845) 2 C. & K. 152; *Sureling v. Pearce*, (1859) 30 L. J. C. P. 109.

⁴ *Hathesing v. Laing*, (1873) 43 L. J. Ch., 283 (lien apart from possession).

⁵ *Paul Beier v. Chotalall*, (1904) 30 B. p. 24.

⁶ *Dashwood v. Magniac*, (1891) 3 Ch. p. 372.

⁷ *Abbott v. Bates*, (1875) 45 L. J. C. P. 117; *Phillipps v. Baird*, I. H. & N. 218; *Trucman v. Loder*, (1940) 11 A. & E. 600.

⁸ *Hutton v. Warren*, (1836) 5 L. J. Ex. 234, 46 R.R. 368; *Hall v. Janson*, (1855) 24 L. J. Q. B. 97.

repugnant to, or inconsistent with, the express terms of the contract.¹

§ 79.

If a custom is inconsistent with the written contract the evidence of it is not receivable² and this inconsistency may be evinced by the express terms of the contract or by implication therefrom³; the mere fact that it varies the apparent contract,⁴ or regulates the mode of its performance, without changing its intrinsic character,⁵ or provides that in a sale for credit delivery is not to be made before payment,⁶ or that that a seller must supply goods of his own manufacture,⁷ is not sufficient to exclude it.

It has been laid down in *Humfrey v. Dale*,⁸ that “in a certain sense every material incident, which is added to a written contract, varies it, makes it different from what it appeared to be and so far is inconsistent with it. If by the side of the written contract without, you write the same contract with the added incidents, the two would seem to import different obligations and be different contracts. The truth is that the principle on which the evidence is admissible is that the parties have not set down on paper the whole of their contract in all its terms, but those only which were necessary to be determined in the particular case and by specific agreement, and which of course might vary infinitely leaving to implication and tacit understanding all those general and unvarying incidents

¹ See *Kirchner v. Venus*, (1859) 12 Moore's P. C. p. 398; *Volhart Bros. v. Vettivelu*, 11 M. 461; *J. G. Smith v. L u d h a Ghella*, 17 B. 129 (1892); *Indur Chandra Dugar v. Lachmi Bibee* (1871). 7 B. L. R. 682.

² *Indur Chandra Dugar v. Lachmi Bibee*, 7 B. L. R. 682.

³ *Myers v. Sarl*, (1860) 3 E. & E. 300, 30 L. J. Q. B. 9.

⁴ *Brown v. Byrne*, 3 E. & B. 703, (1854) 23 L. J. Q. B. 313.

⁵ *Robinson v. Mollett*, (1870) L. R. 7 H. L. 802, 836.

⁶ *Field v. Lelean*, (1861) 30 L. J. Ex. 168.

⁷ *Johnson v. Raylton*, (1881) 7 Q. B. D. 438 C. A.

⁸ (1857) 7 E. & B. 266.

§ 79. which a uniform usage would annex, and according to which they must in reason be understood to contract, unless they expressly exclude them. To fall within the exception of repugnancy the incident must be such as if expressed in the written contract, would make it insensible or inconsistent. Thus to warrant bacon to be prime singed adding 'that is to say slightly tainted,' as in *Yates v. Pim*¹ or to insure all the boats of a ship, and add 'that is to say, all not slung on the quarter,' as in *Blackett v. The Royal Ex. As. Co.*² would be instances of contracts in which both the two parts could not have full effect given to them, if written down."

In the above case a broker was held liable by usage as a party to the contract. In the same way an agent has been held liable by usage as principal.³

In a case⁴ where a custom was set up that on a contract of sale by sample, the broker could not by the custom and usage of the London corn trade reject for difference or variation in quality, unless the same is excessive or unreasonable, and so found by arbitration under the contract, Channell J. in dealing with the suggestion that the custom contradicted the written contract, said " I think that objection is answered by the fact that this particular custom which it is sought to import into this contract, is imported or introduced into a large number of contracts in this trade, and that when it forms part of the contract, it is not contended that it makes the contract insensible so that effect cannot be given to it. I do not think therefore that the custom is so inconsistent with the contract in this case, that the contract cannot be acted upon."

In England it has recently been held⁵ that if there is a plain contradiction between the alleged custom and the

¹ (1816) 16 R. R. 653.

² (1832) 1 L. J. Ex. 101.

³ *Hutchinson, v. Tatham*,
(1873) L. R. 8 C. P. 482.

⁴ *In re Walker's*, (1904) 2
K. B. p. 158; but see *Bennetts v.*
Brown, (1908) 1 K. B. 490.

⁵ *Re North-Western Rubber*
Co., (1908) 2 K. B. 907 C. A.

express words of the contract evidence of the custom is not admissible. If the custom is explanatory, it can be admitted, if contradictory, it cannot ;¹ an addition, if pure addition, is not explanation.² The correct rule is that the custom must not be contradictory to the tenor of the contract.³ A custom cannot turn a condition into a warranty, for that is contradicting the express provision of the contract.³ § 79.

Under the Evidence Act, however, the position of a trade usage is not necessary the same as in England. Section 92 after excluding parol evidence for the purpose of contradicting, varying, adding to or subtracting from the terms of a written document, adds, any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description may be proved : provided the annexing of such incident would not be repugnant to or inconsistent with, the express terms of the contract.

The legislature seems to have adopted the view taken by Campbell, C. J., who said whether the parol evidence of usage be treated as explaining the language used or as adding a tacitly implied incident to the contract beyond those which are expressed, is not material,³ and semble the recent ruling cited above² that a pure addition is not explanation and therefore inadmissible, is only sound in India if besides being an addition it is contrary to the tenor of the contract, and the passages quoted from *Humfrey v. Dale*⁴ are the correct criteria for testing repugnancy and were adopted by the Evidence Act.

It follows that the parties can always by express⁵ stipulation or by implication⁶ exclude from their contract

¹ Citing *Humfrey v. Dale*, (1857) E. B. & E. 1004 (where the Court differed as to under which heading the custom came).

² *Re North-Western Rubber Co.*, (1908) 2 K. B. 907 C. A.

³ *Humfrey v. Dale*, (1857) 7 E. B. 286.

⁴ See §§ 75, 79.

⁵ *Brenda v. Green*, (1900) 1 Q. B. 518.

⁶ *Hutchinson v. Tatham*, (1878) L. R. 8 C.P. 482; *Aktieselskab v. Ekman*, (1897) 2 Q. B. 83 C.A.

§ 79. the operation of any usage or modify it.¹ But oral evidence cannot be given to show that they have so agreed. For if a custom is proved, no evidence save that of the written contract is admissible to show that it was excluded by express agreement.²

No parol of evidence exclusion admissible.

§ 80. Reasonable. As to whether a usage must be reasonable depends on whether the party to be charged knew of it or not, at the time of contracting ; if he knew, it does not matter if it is unreasonable, if he did not, it must be reasonable.³ The above seems to be a correct statement of the law. There are authorities for the proposition that all usages must be reasonable,⁴ but it seems clear that it is only with regards to persons who have in fact no knowledge of its existence, that it can be considered as being reasonable or not.⁵ If it is a custom that it is convenient is shewn by the fact that it is established and followed.⁶ A usage, it has been held in India, must be reasonable if it is to bind without knowledge and consent.⁷ If there is knowledge and consent, it is hard to see how a usage can be called unreasonable even if according to the best opinion the practice is vicious and unreasonable,⁸ and of course, knowledge may be an important element in deciding whether a custom is reasonable or not.⁹

¹ *Tucker v. Linger*, (1883) 8 A. C. p. 511.

² See S. of G. Act s. 55 per Blackburn J. in *Burges v. Wickham*, (1863) 3 B. & S. p. 697 ; *Fawkes v. Lamb*, (1862) 31 L. J. Q. B. 98; *Wilkins v. Wood*, (1848) 17 L.J.Q.B. 319, *Myers v. Sarl*, 30 L.J.Q.B. p. 15; *Parker v. Ibbertson*, (1858) 27 L. J. C. P. 236 ; *Simpson v. Margetson*, (1847) 17 L.J.Q.B. 81; see *Newman v. Gatti*, (1908) 24 T. L. R. 18.

³ See Smith's L. C. 11th Edition, Vol. I., p. 516.

⁴ *Tucker v. Linger*, (1883) 8 A.C. p. 511; *Nelson v. Dahl*, (1879) 12 Ch. D. 568 ; *Moult v. Halliday*, (1898) 1 Q. B. 125 ; *Devonald v. Rosser*, (1906) 2 K. B. 728.

⁵ *Nelson v. James*, (1882) 51 L. J. Q. B. 369.

⁶ *Grissell v. Bristow*, (1868) 38 L. J. C. P. 10.

⁷ *Volkart Bros. v. Vettivelu*, (1887) 11 M. p. 466.

⁸ *Stewart v. West India & P. Co.*, (1873) 42 L. J. Q. B. 191.

⁹ *Perry v. Barnett*, (1885) 15 Q. B. D. p. 472.

A usage is unreasonable if it absolutely alters the nature of the contract,¹ but such a usage will bind parties who contracted with knowledge of it.²

§ 80.

To be unreasonable it is not enough that it is strange, but it is enough that it is unjust.³ It must not change the intrinsic character of the transaction,⁴ or give a person exercising a judicial capacity an interest against his duty⁵, or conduce to fraud,⁶ dishonesty⁷ or extortion, or be oppressive, though a custom may be a very inconvenient custom without being a bad one.⁸ Evidence of a usage was rejected in *Diplock v. Blackburn*,⁹ on the ground that it was a usage of fraud and plunder, but it does not appear whether the party sought to be charged was aware of the usage.

What is unreasonable.

The question of reasonableness is for the Court, and evidence may be given to show that the alleged usage is unreasonable,¹⁰ and evidence of similar usages between other parties in the same trade may be given to show its reasonableness.¹¹ If a custom is rejected as unreasonable for any similar cause, the contracting parties are bound by the contract as it stands without the custom.¹²

The question has sometimes been raised as to how far a usage is binding on those who have contracted in

§ 81. Knowledge how far necessary.

¹ *In re Walker's*, (1904) 2 K.B. p. 158.

² *Seymour v. Bridge*, (1884) 14 Q. B. D. 460.

³ *Robinson v. Mollett*, L. R. 7 H. L. p. 817, 818.

⁴ *Arlapa Nayak v. Narsi*, (1871) 8 B. H. C. A. C. 19; *Robinson v. Mollett*, (1870) L.R. 7 H.L. 802; *Bostock v. Jardine*, (1865) 34 L. J. Ex. 142; but see *Ex. p. Rogers*, (1880) 15 Ch. D. 207.

⁵ *Brocklebank v. L. & Y. Rail Co.*, (1887) 3 T.L.R. 575; *Drcw v. Josolyne*, (1887) 56 L. J. Q. B. 490.

⁶ *De Bussche v. Alt*, (1878) 8 Ch D. 286 (agent buying himself

at minimum limit.)

⁷ *Hippesley v. Knee*, (1905) 1 K. B. 1; see *Ransordass v. Kesri-sing*, (1878) 1 B. 229.

⁸ *Vint v. Constable*, (1871) 25 L. T. 324.

⁹ (1811) 3 Camp. 43, 13 R. R. 744.

¹⁰ *Bottomley v. Forbes*, (1838) 5 Bing. N. C. p. 128.

¹¹ *Rowcliffe v. Leigh*, (1877) 4 Ch. D. 661.

¹² *Neilson v. James*, (1882) 51 L. J. Q. B. 369; but see *Grissell v. Bristowe*, (1863) L. R. 4 C. P. p. 49.

§ 81. ignorance of it. It was said in *Kirchner v. Venus*¹ that when evidence of a usage of a particular place is admitted to affect a written contract, it is only on the ground that the parties must be presumed to have made their agreement with reference to the usage ; and that no such presumption can arise when one of the parties is ignorant of it. This is said to be the general rule in the Laws of England.²

It seems from the later cases³ that *Kirchner v. Venus* "must be restrained to subject matters like that before the Court, namely the condition of a holder for value of a negotiable instrument showing upon the face of it a clear right of the ordinary and usual kind uneffected by custom," and the subsequent part of judgment dwelt on the special circumstances of the case.

In a later Indian case⁴ the Privy Council laid it down that "in the result it is enough if a custom appear to be so well known and acquiesced in that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into the contract." For all usages must be notorious.⁵

In a Madras case it was said a custom "must be so universally acquiesced in that everybody in the particular trade knows of it or might know of it,"⁶ if he took pains to enquire."⁷ In neither of these cases is there any reference to the necessity for express knowledge. In

¹ (1859) 12 Moo. P. C. 431 (1848).

² Vol. 10, citing *Hathesing v. Lang*, (1873) L. R. 17 Eq. 92; *Matvieff v. Crosfield*, (1903) 8 Com. Cas. 120.

³ See Smith, L. C. 11th Ed. Vol. I. 565; *Buchle v. Knoop*, (1867) L. R. 2 Ex. 125, 333.

⁴ *Juggomohun Ghose v. Mamickchund*, 7 Moo. 1. A. 263 (1859);

see *Donald v. Rosser*, (1906) 2 K. B. 728.

⁵ *Re. Goetz*, (1898) 1 Q. B. 757; *Nelson v. Dahl*, (1879) 12 Ch. D. 568.

⁶ *Cf. Cotton v. Sounes*, (1902) 18 T. L. R. 456; *Low v. Walter*, (1892) 8 T. L. R. 358.

⁷ *Volkart Bros. v. Vettivelu*, 11 M. 462, 466; see *Plaice v. Allcock*, (1866) 4 F. & F. 1074; but see *Price v. Brown*, 14 M. p. 423.

England, except in certain cases, no such knowledge is necessary. § 81.

The general rule has been laid down in *Bayliffe v. Butterworth*.¹ A person who deals in a particular market must be taken to deal according to the custom of that market and he who directs another to make a contract in a particular place, must be taken as intending that the contract may be made according to the usage of that place.²

In *Robinson v. Mollett*³ this rule was qualified, by adding 'provided the usages are such as regulate the mode of performing the contracts, and do not change their intrinsic character.'⁴ But this qualification only applies where the other party is ignorant of its existence.⁵

There is also the qualification that the custom must not be unreasonable or otherwise objectionable in law if it is to bind without express notice.⁶ The cases dealing with the custom of the London Stock Exchange for brokers to disregard Leeman's Act in consequence of which their contracts are not enforceable in the Courts, illustrate the above qualification : if the custom is known to the client he is bound by it,⁷ but if he does not know of it, he is not.⁸ Unreasonable.

Subject to these qualifications the general rule has been frequently followed.⁹

But it has been held¹⁰ that this rule does not apply to a usage of Lloyd's, it being merely a private place of Lloyd's.

¹. (1847) 1 Exch. 425. cf. *Nelson v. Dahl*, (1879) 12 Ch. D. 568. L. R. 7 H. L. p. 836; *Perry v. Barnett*, (1885) 15 Q. B. D. 388 C. A.

² See *Mollett v. Robinson*, (1870) L. R. 7 C. P. p. 111; *Graves v. Legg*, (1856) 26 L. J. Ex. 316.

³ (1875) L. R. 7 H. L. 802, 834, 836.

⁴ See *Waddell v. Blockey*, (1878) 4 Q. B. D. 678 C. A.; *De Bussche v. Alt*, (1878) 8 Ch. D. 286 C. A.

⁵ *Robinson v. Mollett*, (1875)

⁶ *Ropner v. Sloate*, (1905) 92 L. T. 328.

⁷ *Seymour v. Bridge*, (1884) 14 Q. B. D. 460.

⁸ *Perry v. Barnett*, (1885) 15 Q. B. D. 388 p. 398.

⁹ See Smith L. C. 11th Ed. Vol. 1, p. 567.

¹⁰ *Grissell v. Bristowe*, (1868) L. R. 4 C. P. 36.

§ 81. business. In *Matvieff v. Crosfield*¹ Kennedy J., in dealing with an alleged custom of Lloyd's, said "I think it better not to express an opinion whether such a custom is reasonable or not. The authorities bind me to say that unless the plaintiffs knew of the custom, the settlement between the broker and the underwriter is not a good discharge of the latter."

Agent's
knowledge.

A general and notorious custom which is unreasonable and it seems even though it is illegal, will be binding if it is known and assented to by the party, sought to be charged.² This also applies to mere practices of particular places such as Lloyd's,³ but in such a case the knowledge of the agent will not be imputed to the principal, and when the rights under a contract have been assigned for value, a mere particular practice, it is said, must be shown to have been known to the assignee and all prior assignees to have been a term of the original contract if it is to bind them.⁴

In a recent case it was observed that it would be an extraordinary thing if a custom not generally known, should have a higher effect than an express veto given by the principal to his agent.⁵ But this was a case where there was no contract between the parties ; it was a question as to customary powers of agents.

§ 82.
Certain.

In Taylor⁶ on Evidence it is stated that a custom or usage of trade need not to be admitted in evidence, be capable of being defined with precision and accuracy, but it was held on a Madras⁷ case that it must have quite as much certainty as the written contract itself, and it would

¹ (1903) 8 Com. Cas. 120, dealing with a custom of Lloyd's. But see *Robinson v. Mollett*, (1874) L. R. 7 H. L. 802, dealing with the Stock Exchange.

² See Phipson on Ev. p. 85.

³ *Harker v. Edwards*, (1887) 57 L. J. Q. B. 147.

⁴ *Mana Vikrama v. Rama*, 20 M. 275.

⁵ *Oppenheimer v. Attenborough*, (1908) 1. K. B. 221.

⁶ 11th Ed. p. 782. See *Price v. Brown*, 14 M. p. 423.

⁷ *Volkart Bros. v. Vettivelu*, 11 M. 462.

seem that it must sufficiently define the rights which it annexes, and this view is supported by the English cases.¹ § 82.

It seems that the persons to whom it applies and between whom it operates must be clear² and if it varies in extent, it will be confined to its narrowest limit.³ The fact, however, that a custom depends in its operation upon what the tribunal which has to deal with it, thinks reasonable, does not make it, in law, uncertain. A custom allowing a reasonable variation from the sample of grain in the corn trade, "reasonable" to be decided by an arbitrator, was held not to be an uncertain custom, though the decision depended on the idiosyncrasies of the arbitrator,⁴ and in dealing with a custom for the prices of goods to be settled by a skilled committee of merchants engaged in similar transactions, their Lordships of the Privy Council held that in the absence of proof of fraud either in the inception or in the proceedings of the committee, the appellant was bound by its decision; mere error would not be sufficient to upset the decision of an expert tribunal voluntarily set up for the decision of matters of skill.⁵ It was not even suggested that any question of the uncertainty of the custom arose.

Persons bound.

Arbitration.

The Privy Council has held⁶ that to support a mercantile usage there needs not the uniformity of custom. Taylor⁷ on Evidence states it need not be uniform and invariable, while in a Madras case it was held it must be.⁸ It seems that if the party to be charged knew of the

§ 83.
Uniformity.

¹ See *Nelson v. Dahl*, (1879) 12 Ch. D. p. 575, C.A., *Re Walker's*, (1904) 2 K. B. 152; *Wildy v. Stephenson*, (1882) C. & E. 3; *Devonald v. Rosser*, (1906) 2 K.B. 728; but see *Hick v. Tweedy*, (1890) 63 L. T. 765.

² *Daun v. City of London Brewery*, (1869) 38 L. J. Ch. 454, L. R. 8 Eq. p. 161.

³ Cf. *Pirie v. Steel*, (1887) 8 C. & P. 200.

⁴ *In re. Walker's*, (1904) 2 K. B. 152.

⁵ *Pistonji Jhangirji v. Firm of Jaisingdas*, (1908) 3 C. W. N. p. 57 (P. C.).

⁶ *Juggomohun Ghose v. Manickchand*, (1859) 7 Moo. 1, A. 263.

⁷ 11th Ed. p. 780.

⁸ *Price v. Browne*, 14 M. 423.

§ 83. usage, any want of uniformity as long as the parties were *ad idem*, is immaterial. In other cases probably the Madras ruling is the sounder law.¹

Uniform and
Notorious.

The English rule is that the way to prove a custom is to show an established course of business at first contested but afterwards acquiesced in.² It must be uniform.¹ Frequent practice is insufficient³ for usage must be fixed, regular and practically invariable⁴ so as to be universal.⁵ It has been held that a want of mutuality shows a usage to be invalid.⁶

§ 84.
Ancient.

There is no need that the usage should be ancient⁷ nor that it should have been established for a considerable period.⁸ Lord Mansfield held that "it is no matter if the usage has only been for year": and it may be binding though it is still in the course of growth.⁹

§ 85.
Universal.
Must prevail
throughout
the market or
branch of
trade.

It need not be universal; if it applies to a particular class of contracts in a particular place, that is sufficient. It is not clear within how narrow limits a trade usage may prevail.¹⁰ The area may be small¹¹ and the class limited.¹²

¹ *Levi v. Barnes*, (1816) 1 Holt. N. P. C. 412; *Johnson v. Crédit Lyonnais*, (1877) 47 L.J.C. P. 241; *Nelson v. Dahl*, (1879) 12 Ch. D. 568 C. A.; *Leuckhart v. Cooper*, (1886) 6 L. J. C. P. 131.

² *Beltany v. Eastern Morning News*, (1900) 16 T. L. R. 401; *Birrell v. Dryer*, (1884) 9 A. C. 345.

³ *Dickinson v. Jardine*, (1868) 37 L. J. C. P. 321; *Sea S. S. Co. v. Price*, (1903) 8 Com. Cas. 292; *Heisch v. Carrington*, (1833) 11 A. & E. 555 n.

⁴ *Rodocanachi v. Milburn*, (1886) 56 L. J. Q. B. 202; *Baines v. Ewing*, (1866) 35 L. J. Ex. 194.

⁵ *White v. Henderson*, (1885) 2 T. L. R. 119.

⁶ *Daun v. City Brewery*, (1869) L. R. 8. Eq. p. 161.

⁷ *Juggomohun Ghose v. Bugwandas*, 7 Moo. I. A. 282.

⁸ *Crouch v. Crédit Foncier*, (1873) L. R. 8 Q. B. p. 386.

⁹ See *Aberdeen Arctic Co. v. Sutter*, (1862) 6 L. T. 229; *Edelstein v. Schuler*, (1902) 2 K. B. p. 154; *Noble v. Kennoway*, (1780) 2 Doug. p. 513; Taylor on Ev. 11 Ed. p. 782.

¹⁰ *Mallon v. May*, (1844) 14 L. J. Ex. 43; *Carter v. Crick*, (1859) 28 L. J. Ex. 238; *Hick v. Tweedy*, (1890) 63 L. T. 765.

¹¹ *Norden Steamship Co. v. Dempsey*, (1876) 1 C. P. D. 654; *The Sheila*, (1909) P. 31.

¹² *Temple v. Runnalls*, (1902) 18 T. L. R. 822.

There may be a custom of a trade ¹ or a market, ² or business ³ and of such trade ⁴ or market ⁵ in a particular town, or of a trade between two ports as to all commodities or as to one only.⁶ § 85.

So the custom of a port is valid.⁷ The stock exchange customs are valid ⁸ but not those of Lloyd's.⁹

A usage may die out or be ousted by an inconsistent usage ¹⁰ but the fact that it is frequently excluded from contracts does not show that it is extinct.¹¹ § 86.
May die out.

There is a distinction between custom and what is customarily done.¹² A usage must be compulsory and as of right, not merely a business practice¹³ though if long continued it raises a presumption of being compulsory.¹⁴ It is not sufficient that certain leading merchants of a place consider it desirable. ¹⁵ § 87.
Compulsory as of right.

In the second class of cases, evidence of commercial usage is admitted to explain the terms of a contract, on § 88.
Usage to explain terms.

¹ *Syers v. Jones*, (1848) 2 Ex. 111 (Tobacco trade); *Swancott v. Westgarth*, (1803) 4 East. 75 (Linen trade).

² *Pollock v. Stables*, (1848) 17 L. J. Q. B. 352 (share market).

³ *Cotton v. Sounes*, (1902) 18 T. L. R. 456 (Theatrical).

⁴ *Mollet v. Robinson*, (1870) L. R. 7 H. L. 802; *Luard v. Butcher*, (1846) 2 C. & K. 29; *Raitt v. Mitchell*, (1815) 16 R. R. 765, 4 Camp. 146; *Grey v. Butler*, (1898) 3 Com. Cas. 67 (law of the river).

⁵ *Fleet v. Murton*, (1871) 41 L. J. Q. B. 49; *Pollock v. Stables*, (1848) 17 L. J. Q. B. 352 (Leeds share market).

⁶ *Taylor v. Briggs*, (1827) 2 C. & P. 525; *Gould v. Oliver*, (1837) 7 L. J. C. P. 68.

⁷ *Norden v. Dempsey*, (1876) 45 L. J. P. 764.

⁸ *Sweeting v. Pearce*, (1859) 30 L. J. C. P. 109; *Ward v. Harris*, (1882) 8 L. R. Ir. 365; *Gabay v. Lloyd*, (1825) 9 C. B. N. S. 536.

⁹ See § 76.

¹⁰ *Moult v. Halliday*, (1896) 1 Q. B. 125.

¹¹ *Ropner v. Sloate*, (1905) 92 L. T. 328.

¹² *In re North W. Rubber Co.*, (1908) 2 K. B. p. 919; see *Ropner v. Sloate*, (1905) 10 Com. Cas. 73.

¹³ *Attwood v. Sellar*, (1879) 5 Q. B. D. 286; see *Pettit v. Mitchell*, (1842) 12 L. J. C. P. 9; *Meyer v. Dresser*, (1864) 33 L. J. C. P. 289; *Marwood v. Taylor*, (1901) 6 Com. Cas. 178; see as to providing trucks, *Rodenacker v. May*, (1901) 6 Com. Cas. 37.

¹⁴ *Svendson v. Wallace*, (1885) 10 A. C. 404, 53 L. J. Q. B. 385.

¹⁵ *Sea Steamship Co. v. Price*, (1903) 8 Com. Cas. 292.

- § 88. the ground that by a custom of the trade the terms bear a peculiar meaning.¹ But the evidence must be clear and consistent.²

In Smith's L. C. a collection has been made of the English cases. In India the terms "F. O. B." ³ "In Bombay Harbour," ⁴ "with interest" have been explained by evidence of custom.

§ 89.
Phrase
need not be
ambiguous.

In order to introduce extrinsic evidence, it is not necessary that the phrase itself should be at all upon the face of it ambiguous. The evidence will not be excluded because the words are in their ordinary meaning unambiguous: for the principle of admission is that words perfectly unambiguous in their ordinary meaning are used by the contractors in a peculiar sense.⁵ As it was put by Colridge, J.,⁶ "What words are more plain than 'a thousand' 'a week' 'a day'? Yet the cases are familiar in which a 'thousand' has been held to mean twelve hundred:—'week' a week, only during the theatre season:—'a day' a working day. In such case the evidence neither adds to nor qualifies nor contradicts the written contract: it only ascertains it by expounding the language." But for a custom altering the natural meaning of words to be recognised by the Courts, very strong evidence of its existence must be given.⁷

The Evidence Act section 98 provides that evidence may be given to show the meaning of illegible or not commonly intelligible characters, of foreign, obsolete, technical, local and provincial expressions, of abbreviations and of words used in a peculiar sense. It would seem that

¹ Ev. Act s. 98.

² *Bowes v. Shand*, (1877) 2 A. C. 455.

³ *Aga Synd Saduck v. Hajee Jackariah Mahomed*, (1863), 2 Ind. Jur. 311.

⁴ See to *Haji Mahomed Haji Jun v. Spinner*, (1900) 24 B. 510.

⁵ *Myers v. Sarl*, (1860) 30 L. J. Q. B. p. 14.

⁶ Per Colridge J. in *Brown v. Byrne*, (1854) 23 L.J.Q.B. 313 and see Smith, L.C. p. 57 Vol. I.

⁷ Per Lord Hatherly in *Bowes v. Shand*, (1877) 2 A.C. 455. 478.

“words used in a peculiar sense” need not be *prima facie* doubtful, and Taylor states that evidence of usage is admissible to show that words have two meanings, one common and universal, the other technical, peculiar or local. There are cases however cited in Taylor¹ on Evidence such as *Blackett v. Royal Insurance Co.*² for the proposition that where the words are plain, evidence of usage is not admissible to contradict them.³ But this appears to be incorrect. For Blackburn J. said “it will be found, I think in each of the cases in which evidence has been rejected as for instance in *Blackett v. Royal Insurance Co.*² and in *Spartali v. Bcneche*,⁴ that the Court thought, upon taking the language of the whole contract, it evinced upon the face of it, an intention not to use the phrase or words in question in the particular sense sought to be put upon them.”⁵ If there is nothing to show a contrary intention such evidence is admissible.⁵ But the cases go no further than to permit the explanation of words used in a sense different from their ordinary meaning.⁶

And this, it seems clear, in spite of the proposition quoted from Taylor,⁷ is an established exception⁸ to the usual rule that a contract must be construed according to its natural and literal meaning.⁹

For just as the import of foreign words and scientific expressions may be explained by evidence,¹⁰ so the

¹ 11 Ed. p. 886.

⁷ 11th Ed. p. 886.

² (1832) 2 Tyr. 266, 1. L. J. Ex 101.

³ See too *Bowman v. Horsey*, (1837) 2 M. & Rob. 85; *Cockburn v. Alexander*, (1848) L. J. C P. 74; *G. W. Ry. v. Rows*, L. R. 4 H. L. 659.

⁴ (1850) 19 L. J. C. P 293.

⁵ *Myers v. Sarl*, (1860) 30 L. J. Q. B. p. 15.

⁶ Per Curiam in *Trueman v. Loder*, (1840) 11 Ad. & E. 589; see *Grant v. Maddox*, (1846), 16 L. J. Ex. 227.

⁸ *Rowes v. Shand*, (1877) 2 A. C. 455; *Bruner v. Moore*, (1904) 1 Ch. 808; *Burges v. Wickham*, (1863) 33 L. J. Q. B. 17, *Myers v. Sarl*, (1860) 30 L. J. Q. B. 9; *Smith v. Wilson*, (1832) 1 L. J. K. B. 194.

⁹ *Myers v. Sarl*, (1860) 30 L. J. Q. B. 9; *Southwell v. Bowditch*, (1876) 54 L. J. Q. B. 630; *Holt v. Collier*, (1881) 50 L. J. Ch. 311.

¹⁰ *Grant v. Maddox*, (1846) 16 L. J. Ex. 104.

§ 89. meaning of the terms of commerce may be proved by its customs, supplying as it were the mercantile dictionary in which to find the mercantile meaning of the words.¹

Thus the same words may have different meanings in different documents,² or have a limited meaning.³

Statutory
meaning.

In some instances such evidence is inadmissible as in cases where the words have a statutory meaning, as weights and measures.⁴ Evidence of previous dealings between the parties can also be given to explain the terms of a contract.⁵

§ 90.
Evidence
of Custom.

When the question is as to the existence of any custom, the following facts are relevant :—

(a) Any transaction by which the custom in question was claimed, modified, recognized, asserted or denied, or which was inconsistent with its existence.

(b) Particular instances in which the custom was claimed, recognized or exercised, or in which its exercise was disputed, asserted, or departed from.

Similar
customs.

A custom can be supported by proof of similar customs in the same or analogous trades in other localities.⁶ Evidence of usage has been admitted as to contracts relating to transactions of commerce and trade, farming and other business, for the purpose of defining what would otherwise be indefinite ; or to interpret a peculiar term, or to explain what was obscure, or to ascertain what was equivocal, or to annex particular incidents which although not mentioned in the contracts, were connected with them or with relations growing out of them.⁷

¹ *Bowes v. Shand*, (1877) 2 A.C. 455 ; see *Tancred v. Steel*, (1890) 15 A.C. 125 (translating the contract).

² *Colonial Ins. Co. v. Adelaide*, (1886) 12, A.C. 128 per Bramwell L.J.

³ *Myers v. Sarl*, (1880) 30 L.J. Q.B. 9.

⁴ *Smith v. Wilson*, (1832) 3 B. & Ad. 728, 1. L.J.-K.B. 194.

⁵ *Ghellabhai v. Nandubai*, 20 B. 288, 21 B. 335.

⁶ See Ev. Act s. 13 and Woodroffe on Ev. thereon ; see Phipson on Ev.

⁷ Cited in *Humphrey v. Dale*, (1857-8) 26 L.J.Q.B. 187, 27 L.J. Q.B. 390 ; See Ev. Act, s. 92 pro. 5.

A custom should be proved by evidence of particular instances and transactions in which it has been acted upon, and not by evidence of opinion only, and by multiplying instances of usage of different merchants, if it appears to be the same as that of other merchants.¹ But where evidence of opinions only without instances was given this was said to detract from its weight, but the usage was upheld.²

§ 90.
Mere
opinions.

The fact that it is a common practice to insert a clause in contracts setting out the effect of an alleged custom, is itself the strongest evidence that no custom existed which if not expressly incorporated in the contract, could be read into it.³ But the mere fact that a usage is frequently expressly excluded from contracts does not show that it is no longer in force.⁴

Expressly
included.

Excluded.

Mercantile customs have been determined by the findings of juries, as the custom of bankers,⁵ and the authority of agent to sell on credit.⁶ And even in modern times the meaning of commercial documents have been left to juries to settle "as a matter of business."⁷

The mere fact that a usage has not been established in one case does not necessarily disprove it or prejudice a person seeking to establish it in a subsequent case in respect to a similar transaction.⁸

¹ *Mackenzie v. Dunlop*, (1856) 3 Macq. H.L. Cas. 22, but see *Ev. Act s. 49*, *Volkart Bros v. Vettivelu*, 11 M. 465.

² *Paul Beier v. Chotalall*, (1904) 30 B.L.; but see *Mackenzie v. Dunlop*, (1856) 3 Macq. H.L.C. p. 26, 40.; *Cunningham v. Fonblanque*, (1883) 6 C. & P. p. 47; *Rahimatbai v. Hirbai*, (1877) 3 B. 34; *Gopal Narhar v. Hanmant*, (1879) 3 B. p. 297.

³ *Re North-Western Rubber Co.*, (1908) 2 K.B. 907 C.A.; see *Biddell v. Clemens*, (1911) 1 K.B.

p. 947, 948, since reserved in H.L.

⁴ *Ropner v. Sloate*, (1905) 92 L.T. 828.

⁵ *Foster v. Bank of London*, (1862) 3 F. & F. 214.

⁶ *North v. Jackson*, (1859) 2 F. & F. 198; *Schweitzer v. Long*, (1863) 3 F. & F. 687.

⁷ *Stewart v. Merchants Marine Ins. Co.*, (1885) 16 Q.B.D. p. 627, 55 L.J. Q.B. 81, cf. *Bowes v. Shand*, (1877) 2 A.C. 455.

⁸ *Beckhuson v. Hamblett*, (1901) 2 K.B. 73 C.A.

§ 91.
Onus.

Shifting of
onus.

The evidence must not be repugnant,¹ insensible, inconsistent² or thoroughly unreasonable.³

The onus of proving a custom lies on the party asserting it,⁴ and he must begin by showing the existence of the custom and not by asking what the custom is.⁵ As to what is sufficient evidence to establish a usage of trade by which particular words in the instrument have acquired a peculiar meaning, see *Mackenzie v. Dunlop*⁶ and *Kidston v. Empire Marine Co.*⁷ and cases cited in Smith L. C. 11th Ed., Vol. I, p. 577. Once the custom is established the onus of proof that it does not apply to the contract⁸ or is inconsistent with it is shifted on to the other side.⁹ But Parol evidence is inadmissible to show that it was intended to exclude a particular usage from applying to a written contract.¹⁰

Where a custom has been proved in a particular case it has the same effect as if it had been an express term of the contract.¹¹

Numerous instances of terms being engrafted on contracts by usage are given in Smith L. C.¹²

Previous
dealings.

It must be remembered that a term can only be added by a custom, evidence of previous dealings between the parties is only admissible to explain meaning of the terms

¹ *Gulf Line v. Laycock*, (1901) 7 Com. Cas. 1.

² *Aktieselkal v. Ekman*, (1897) 2 Q.B. 83.

³ *Barrow v. Dyster*, (1884) 13 Q.B.D. 635.

⁴ *Carter v. Crick*, (1859) 28 L. J. Ex. 238.

⁵ *Gibson v. Crick*, (1862) 31 L. J. Ex. 394; *Curtis v. Peck*, (1864) 13 W.R. 230 (Eng.).

⁶ (1856) Macq. H. of L. C. 22.

⁷ (1866) 36 L. J. C. P. 156.

⁸ *Webb v. Plummer*, (1819) 2 B. & A. 746, 21 R.R. 479.

⁹ *Senior v. Armytage*, (1816) 1 Holt. 197, 17 R.R. 627, see *Myers v. Sarl* 20 L.J. Q.B. p. 16; *Holt v. Collyer*, (1881) 16 Ch. D. 718.

¹⁰ *Fawkes v. Lamb*, 31 L. J. Q. B. 98, see § 79.

¹¹ *Fawkes v. Lamb*, (1862) 31 L.J. Q. B. 98; see Roscoe, 16 Ed. p. 24; *Parker v. Ibbetson*, (1858) 27 L.J. C.P. 236.

¹² 11th Ed. Vol. 1 p. 558, under *Wigglesworth v. Dallison*.

used in a contract, and not to impose on a party an obligation as to which the contract is silent.¹ § 91.

In India interest has been held payable by custom.² See also *Price v. Browne*³ as to a custom restricting the use of horses hired at Ootacamund and *Volkart Bros. v. Vettivelu*⁴ as to a custom of exchanging cotton in Tuticorin; and for the *pacca adat* system in Bombay, see *Chandulal v. Sidhruthrai*.⁵

It seems that not only a term, but a party can be added by oral evidence to a contract in writing.⁶ A broker who was in fact not contracting as a purchaser, was held liable by custom for the contract, in *Humphrey v. Dale*.⁶ This case was discussed in *Myers v. Serl*⁷ and in *Southwell v. Bowditch*.⁸ But it has been constantly acted upon and is, it seems, firmly established.⁹ It has been held however that evidence of custom to discharge a contracting party is inadmissible.¹⁰ Party added by custom.

Arbitrators are not the proper tribunal to decide conclusively the existence of a custom.¹¹

It is not every trade usage that requires proof. A custom may have been so frequently proved as to become part of the law merchant,¹² and the subject of judicial knowledge¹³ as for instance the condition of seaworthiness annexed by custom of merchants to contracts of Marine Insurance. The latest custom to be so recognised in § 92. Judicial notice.

¹ *Ghellabhai v. Nandubhai*, (1896) 20 B. 238, see § 582.

² *Juggomohun Ghose v. Manickchand*, (1859) 7 Moo. 1 A. 263.

³ 14 M. 420.

⁴ 11 M. 459.

⁵ 22 B. 291.

⁶ *Humphrey v. Dale*, 7 E. & B. 266 (1859).

⁷ (1860) 30 L. J. Q. B. 9.

⁸ (1876) 1. C. P. D. 374. See Smith L.C. 11th Ed. Vol. 1 p. 562.

⁹ See *Re North-Western Rubber Co.*, (1908) 2 K. B. 907 C. A.

¹⁰ *Magee v. Atkinson*, (1837) 2 M. & W. 440.

¹¹ *Re North-Western Rubber Co.*, (1908) 2 K. B. 907 C. A., following *Hutcheson v. Eaton*, 13 Q. B. D. 861 (1884).

¹² See Smith's L. C. 11th Ed. Vol. 1 p. 557; *Gibson v. Small*, 4 H. L. C. 353 (1852).

¹³ *Biddell v. Clemens*, (1911) 1. K. B. 934 C. A. reversed in H.L.

§ 92.
Proof of
usages.

England was that of treating debenture bonds payable to bearer as negotiable.¹ But it must not be taken that when a usage has once been proved as a matter of fact, it is to be in all subsequent cases judicially noticed. The precise period or process of transition from being a fact to be proved to receiving judicial notice, is not easy to determine. In *Edelstein v. Schuler*,¹ a custom was held to no longer require proof,² and in *Southwell v. Bowditch*,³ a custom though proved in several cases was held still to require evidence to establish it. Where juries have frequently recognised usages, the judges have treated them as established.⁴

Previous recognition assists in making it incumbent on a party denying the custom to give evidence in rebuttal,⁵ and in one case a final decree based on a custom has been held to be the most satisfactory evidence of its existence.⁶ But the personal knowledge of an individual Judge is not sufficient.⁷

It does not follow that because a custom exists in one market that it exists elsewhere : as the Privy Council⁵ observed as to a custom of paying interest, "it might well be that such a custom prevails in Bombay, but does not prevail in Calcutta." Further the Court, it seems, may act on a proved change of usage within recent memory.⁸

When a custom has not been so frequently recognised as to obtain judicial notice, it must be proved by evidence in each case.⁷

¹ *Edelstein v. Schuler*, (1902) 2 K. B. 144. *chand*, 7 Moo. I. A. 282.

² See *George v. Davies*, (1911) 104 L. T. 643. ⁶ *Ex. p. Powell*, (1875) 45 L. J. Bk 100.

³ (1876) 1 C. P. D. 100, 374.

⁴ *Levitt v. Hamblett*, (1901) 2 K. B. 53, 70 L. J. K. B. 520.

⁵ *Joggomohun Ghose v. Manik.*

⁷ *Biddel v. Clemens*, (1911) 1 K. B. 934 C. A. reserved in H.L.

⁸ *Moult v. Halliday*, (1898) 1 Q. B. p. 130 ; and see para. 81.

CHAPTER V.

Sale of Goods.

Before examining the Contract Act as to its provisions in respect of the sale of goods it is necessary to consider the general scope of the Act, which in many sections illustrates the danger of attempting to put a principle of law into the iron framework of a statute.¹ Doubtless the code is founded on the English Common Law, but the Indian courts have never recognised the law of England as the *lex fori*,² and the code has not enacted the English rules without modification; whether this was done deliberately or accidentally in drafting is not always clear. But although the code must be construed in the light of the pre-existing doctrine, still it is the Indian law and must not be too readily assumed to be identical with the English law, as Crouch, C. J., held "in construing this Act, which is to be the law of contract in India we must not adopt as a rule of construction that it was intended to make the contract law of India the same as the law of England. Indeed there are reasons for thinking that the Legislature intended that in some respects there should be a different law for India, and therefore we cannot refer to any English case as a guide. We must look at the words of the law and gather from them as well as we can what was the intention of the legislative authority."³

Garth, C.J., was of a similar opinion and ruled that questions of sale, delivery and the like, must be determined by reference to Contract Act and not to the English Law⁴

§ 93.
Principles
of
construing
the code.

¹ See *Colls v. Home and Colonial States*, (1904) A.C. p. 183.

² *Murtunjoy Chuckerbutty v. Cockrane*, (1865) 4 W.R. 1 P.C.

³ *Greenwood v. Holquette*, (1873)

12 B.L.R. 42 [as to s. 108 Ex. 1 see also *Jugdeo Narain v. Rajah Singh*, (1883) 15 C. 662.]

⁴ *Buldeo Dass v. Howe*, (1880)

6 C. 64.

§ 93. Sarjent, C.J.¹ said "it will be well to consider how the law stood before the Indian Contract Act upon the proper construction of which its solution depends." But it is clear from his judgment that his view was, the Act had to be construed and he only referred to the previous law to elucidate the technical words in section 103 which he considered as being intended by that section to be construed according to the previous decisions. Their Lordships of the Privy Council stated in *Mohori Bibee v. Dharmodas*,² that their view of the Contract Act was that so far as it goes it is exhaustive and imperative. Referring to another Act,³ their Lordships observed that it was exhaustive on the matters in respect of which it declares the law and it is not the province of a judge to disregard or go outside the letter of an enactment according to its true construction; but that particular Act purports to be exhaustive, and the reservation expressed in the words "so far as it goes" with respect to the Contract Act suggests that their Lordships had this distinction in view: for though it is the essence of a code to be exhaustive, the preamble of the Contract Act disclaims any such intention.

The leading case on interpretation of a code is the *Bank of England v. Vagliano*,⁴ where it was said that the proper course is in the first instance to examine the language of the statute, and to ask what is its natural meaning uninfluenced by any considerations derived from the previous state of the law.⁵ Lord Herschell adds "I am of course

¹ *Le Geyt v. Harvey*, (1884) 8 Bom. 501.

² 80 I. A. p. 114, (1908) 80 C. p. 548 (infant's contract); but see *Irrawaddy Co. v. Bugwandas*, (1891) 18 I. A. 121.

³ *Gopal Mandar v. Pudmanand*, 29 I. A. 202 P.C. (Bengal Tenancy Act), cf. *Lala Sing Prosad v. Golab Chand*, (1901) 28 C. 517, 528 A.C. i.e. (the Transfer of Property Act).

⁴ (1891) A. C. 107, followed in *Brojodullal v. Ramana th Ghose*, (1897) 24 C. 908 A. C.; *Lala Suraj v. Golab Chand*, (1901) 28 C. 517 A. C., cf. *Jogodishury v. Kailash Chandra*, (1897) 24 C. 725 F. B.

⁵ This was disapproved of in Ireland, *Wallis v. Russell*, (1902) 2 Ir. Rep. 585, 590, 603.

far from asserting that resort may never be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the code ; if for example the provision be of doubtful import, such resort would be perfectly legitimate. Lord Herschell further says¹ that "if the conclusion which I have indicated, involved some absurdity or led to some manifestly unjust result, I might perhaps, even at the risk of straining the language used, strive to put some other interpretation upon it. It appears to me important to show that the words of the enactment might have their natural effect given to them, without leading to results either unjust or commercially inconvenient."

§ 93.

In Maxwell on Interpretation of Statutes, 3rd Ed., p.319, it is stated that when the language of a statute in its ordinary meaning and grammatical construction, leads to a manifest inconvenience, absurdity or hardship, presumably not intended, a construction may be put upon it which modifies the meaning of the words and even the structure of the sentence.

Further to alter any clearly established principle of law a distinct and positive legislative enactment is necessary.² And in England the presumption is that an Act was not intended to alter the Common Law, and the courts should not begin by assuming that there is a real conflict and sacrificing the Common Law, but should rather proceed "by examining carefully in the first place whether the two may not be reconciled and full effect given to both."³ But in India the Contract Act cannot where it is express be limited by the Common Law ; the principle that applied in England to Common Law remedies, namely that statutory remedies do not oust old remedies,⁴ unless they are

§ 94.
Old rights
and
remedies.
Common
Law rules.

¹ *Ibid.* p. 147.

M.C. 138 ; *R. v. Morris*, (1867) L.R.

² *Arthur v. Bekenham*, (1708) 1 C.C. R. 90. 95 ; *Warden of St. 11 Mod. 150 ; Rolfe v. Flower*, *Paul's v. Dean*, (1817) 4 Price 65 (1866) L. R. 1 P. C. 27.

⁴ *Stevens v. Chown*, (1901) 1 Ch.

³ *R. v. Scott*, (1856) 25 L.J. 894, 903.

§ 94. inconsistent,¹ doubtless applies, but the tendency to import the Common Law into India in the face of express enactments is far too common.

The result of the cases seems to be that the construction of the Act depends primarily on its wording, but if the natural meaning of its terms would lead to commercial inconvenience or to an absurdity presumably not intended or if the meaning be doubtful or ambiguous a broader method of interpretation may be adopted which would naturally be to construe the Act in the light of the previous law and with respect to the Contract Act, the preamble invites a reference to the previous law in all points not expressly dealt with.

§ 95.
Compared
with other
codes.

A comparison of the Indian Code with the English Sale of Goods Act and other codes, is useful, for where similar provisions exist in various codes, there is a strong presumption that the rule is founded on broad grounds of expediency and that its application should not be narrowed.²

§ 96.
Are the
rules in the
Act subject
to the inten-
tion of the
parties?

The first question which arises in respect to the chapter on the sale of goods, is as to whether the sections lay down fixed rules of law, not capable of being displaced even by evidence of a contrary intention, or whether the Common Law doctrine still prevails and the sections do no more than the English Sale of Goods Act, which expressly enacts that the object of its rules is only to assist in ascertaining the intention of the parties. The majority of the sections purport to lay down fixed rules, whereas in certain sections the rules therein stated are made subject to the intention of the parties.³ This doubtless points to the conclusion that where the qualification is

¹ *O'Flaherty v. M'Dowell*, (1857) 6 H. L. C. 142, 158; *Steward v. Greaves*, (1842) 10 M. & W. 711, and see *P. R. & Co. v. Bhagwandas*, (1909) 11 Bom. L. R. 335, 34 B. 192 C. A.

² See Chalmers S. of S. Act 3rd Ed. p. 8.

³ See sections 93, 94, 113, 121; subject to any special agreement ss. 95, 109; subject to a contrary intention s. 92.

not expressed, it was not intended, and Maclean, C. J., held in *Brij Coomaree v. Salamander*¹ that "if you find in a contract certain terms from which when they exist the legislature says certain consequences shall ensue, these consequences must ensue." The learned Judge construed section 79 to lay down a fixed rule which the parties could not by their agreement vary. Markby, J., however in the Appeal Court in dealing with a question of the passing of property, said, "I think this is not a question to be decided simply upon the construction of the provisions of the Contract Act, but upon the intention of the parties upon which all questions of this kind ultimately depend."² This case was not cited before Maclean, C. J., in *Brij Coomaree's case*¹ and it is to be noted that his observations were really obiter, and conflict with the full bench ruling that the parties can make their own bargain.³

§ 96.

Intention of the parties.

If Maclean, C. J.'s view is correct the result is that a very serious limitation has been placed upon the freedom of contracts, and that too in relation to commercial contracts which in every other system of Jurisprudence are of all contracts the most free. And this restriction of contractual rights involves a wholesale alteration of the law in force at the time of the passing of the Act. Certain sections are however obviously subject to a contrary intention although not expressly so limited. Section 91 cannot be read according to the strict meaning of the words "delivery to a wharfinger or carrier has"⁴

¹ (1905), 32 C. 816, 823. The rest of the Court avoided the point, and it is generally conceded that the ruling is unsound; in *Juggernath Agarwallah v. Smith*, (1906) 34 C. 173 the C. J. seems to have adopted a broader view; and see his judgment in *Moll Schutte v. Luchmi Chund* (1898) 25 C. 505.

² *Buchanan v. Avdall*, (1875) 15 B. L. R. 276 p. 289 C. A.

³ *Moll Schutte v. Luchmi Chund*, (1898) 25 C. 505, when the same Judge delivered the unanimous judgment of the Court as stated.

⁴ Cf. the S. of G. Act s. 82, where "prima facie" is added.

§ 96. the same effect as delivery to the buyer" ; in the first place the sections on stoppage in transit show that the legislature did not mean to lay down any such universal rule. Then again it cannot be that delivery to a carrier under a bill of lading in the seller's name, has the same effect as delivery to the buyer.¹ The section is doubtless badly expressed, but it obviously means "unconditional delivery," and the rule therein laid down is subject to the unpaid seller's rights. Such delivery has the effect stated *prima facie* ² but without that qualification the section is misleading.

It would seem that serious commercial inconvenience would arise from a narrow interpretation of the Act. And moreover, a result which could not have been intended by the legislature. It seems clear that the sections where an express provision that the intention of the parties is to prevail is omitted, must be construed as subject to an implied proviso to that effect.

Undoubtedly at Common Law and according to the Indian Law previous to the Act, the parties were at liberty to make their own contract.³ Moreover the meaning of the code is not clearly against this view. The illustration to section 79, seems to imply a recognition of the Common Law that had the price of the ship been payable by instalments according to the stage at which the construction had arrived, the property would have passed : or in other words that the parties might by their agreement vary the incidents which section 79 says, if literally construed, must ensue.

A Calcutta bench seems to have taken this view of the Act. Where specific bales were the subject of a sale by numbers, delivery and payment being postponed, but the contract added "or any part thereof that may be in

¹ See *Juggernath Agerwallah v. Smith*, (1906) 33 C. 547, 34 C. 178.

where "prima facie" is added.

³ See per Maclean, C.J., in *Moll Schutte v. Luchmi Chund*, (1898)

² Cf. the S. of G. Act s. 32, 25 C. 595 F. B.

a merchantable condition," the Court considered this a sale of goods or any part of them that was merchantable, and that therefore the purchaser must have an opportunity of inspection. The case they held did not fall within section 78 and the property had not passed.¹ § 96.

In one case² it was argued before the Privy Council that as in some sections of the Succession Act, the proviso "subject to a contrary intention" appeared, it might be implied where it was not expressed. Their Lordships said, "where the qualification is not expressed there is surely no reason for implying it", but were careful to add that to imply such a proviso would make the particular section 111 almost nugatory. This seems to indicate that such a mode of construction is not impossible.³ Such a proviso to be implied.

Another point which must be observed is that this chapter is an instance of almost unexampled inelegance of draftsmanship.⁴ The sections are apparently an ill-assorted selection from several drafts, and seem little entitled to be regarded with the respect due to the average code⁴: moreover this chapter only lays down the rules peculiar to sales of goods, and does not purport to vary the ordinary rules previously enacted. Act badly drafted.

It would seem then that the opinion expressed by Maclean, C. J., is not sound, and that the legislature had no intention to alter the law in this respect, and however badly the chapter on the sale of goods is expressed, it cannot be taken in the absence of clear and unambiguous words, to have restricted the right of free Conclusion.

¹ *Mitchell v. Buldeo Dass*, (1888) 15 C. 1. proviso, is so impliedly, bears out this view.

² *Norendra Nath Sircar v. Kamal*, (1894) 23 C. 563.

³ The comment of Benjamin 5th Ed. p. 398 on section 19 (3) S. of G. Act that the rule therein although not made subject to the intention of the parties by express

⁴ As Mr. Whitley Stokes said, there was no proper revision of the code, and many sections are incomplete and inaccurately worded; *Anglo-Indian Codes Vol. I.* 534.

§ 96. contract, and it is generally conceded that the intention of the parties is the important point.¹

It may be added that such a construction as suggested by Maclean, C. J., would have the effect of abrogating many of the previous sections² of the Act as far as this particular class of contract is concerned, although the Code purports and was intended to lay down provisions applicable to all contracts, and then to deal with the peculiarities of special classes of contracts.

§ 97.
The Act not
exhaustive.

It is clear from the preamble to the Act itself that it does not purport to be exhaustive, but only to define and amend certain parts of the law relating to contracts. It was held by the Bombay Appeal Court that "the mere absence from the Act of a specific provision giving the remedy of a suit to recover the price of goods sold but not accepted, cannot be construed as a distinct legislative withdrawal of that remedy. There is no reason to suppose the Contract Act is the repository, still less that it is the sole repository of the principles applicable to such a suit, for the Act does not purport to do more than define and amend certain parts of the law relating to contracts."³ Further room for this opinion is made by the decision of the P. C. in *Irrawaddy Flotilla Co. v. Bhagwandas*,⁴ where their Lordships say that the Act of 1872 does not profess to be a complete code dealing with the law relating to contracts. There is nothing to show that the legislature intended to deal exhaustively with any particular chapter or subdivision of the law relating to contracts."³ The learned Judge went on to point out that the Act does not provide for a suit for the price of goods sold and delivered, which reduces the argument that it is

¹ See per Markby, J., *Buchanan v. Auldall*, (1875) 15 B. L. R. p. 289 C. A.

² *c. g.* sec. 7, 51-55.

³ *P. R. and Co. v. Bhagwandas*, (1909) 34 B. 192 C. A; (1909) 11

Bom. L. R. 385, overruling 10 Bom. L. R. 1118 the question being if a suit lay for the price of goods sold where the buyer refused to accept delivery.

⁴ (1891), 18 I. A. 121, 18 C. 620.

exhaustive to an absurdity.¹ A decision to the same effect was given by a Calcutta Full Bench in *Moll Schutte v. Luchmi Chand*,² with reference to section 107, the Court holding that the section did not enumerate the only circumstances in which the right of resale arose, but that an agreement giving such a right was valid whether the property in the goods had passed or not.

§ 97.

Where the Code does not apply and there is no legislative provision for a particular case, the law governing the sale of goods is as it pointed out above³ the previous law, that is the Common Law in Presidency towns, and equity and justice in the Mofussil.⁴ In some cases the Legislature it seems left technical terms to be construed with reference to the decisions in force when the Act was passed.⁵

§ 98.
Law where
code is
silent.

English authorities in India are very much in the same position as decisions are in England which were given previous to the Sale of Goods Act. Such previous decisions in England are of no importance or effect where they conflict with the Act, but where the provisions of the Act are of doubtful import, or where the language has acquired a technical meaning, or where the particular matter has not been provided for by the Act, they are still of importance as authorities,⁶ as being part of the Common Law; but the Indian Courts do not consider themselves bound to follow English rulings.⁷

§ 99.
English
cases.

¹ *P. R. and Co. v. Bhagwandas*, (1909) 34 B. 192 C. A.; (1909) 11 Bom. L. R. 385, overruling 10 Bom. L. R. 1113 the question being if a suit lay for the price of goods sold where the buyer refused to accept delivery.

² (1898) 25C. 505 F. B. see *per* Markby, J., on *Sooltan Chand v. Schiller*, (1878) 4 C. 252, as to instalment contracts; *Lilladhar v. Wreford*, (1892) 17

B. 62, as to effect of part performance.

³ See § 3.

⁴ *Ganges Manufacturing Co. v. Sourugmull*, (1880) 5 C. 669.

⁵ *G. I. P. v. Hanmandas*, (1889) 14 B. 57.

⁶ *Robinson v. Canadian Pacific Railway Co.*, (1892) A. C. p. 487; and see s. 61 (2) of the S. of G. Act.

⁷ *Murtunjoy v. Cochrane*, (1865) 4 W. R. 1 P. C.

**§ 100.
English
Common
Law.**

The Contract Act is founded on the Common Law of England, and the English cases prior to the Sale of Goods Act, are decisions based on the Common Law which in the legal view is one preexisting whole, a decision being a declaration of that Common Law, and not an addition to it,¹ and in this way decisions subsequent to the Contract Act may be regarded as authorities in India.

**§ 101.
Illustrations.**

It is a mistake to look at illustrations to the Indian Acts more than to the words of the Act itself,² and Stuart, C. J.³ held that illustrations form no part of an Act.

**§ 102.
Marginal
Notes.**

Further marginal notes to sections of an Indian Act cannot be referred to for the purpose of construing the Act.⁴

¹ As to American decisions see *Re Missouri S.S. Co.*, (1889) 42 Ch. D. p. 380, 331; and 14 C. W. N. notes. *Chand v. Schiller*, (1878) 4 C. 258. *Re Gopessur Dutt*, (1911) 16 C. W. N. p. 270.

² *Omed Ali v. Nidhu*, 22 W. R. 367. ⁴ *Thakurain v. Rai Jugopal*, (1904) 31, 1. A. p. 142; *Punardeo v. Ram Saraph*, (1898) 25 C. 898,

³ *Nanak Ram v. Mekin*, (1877) 1 A. p. 496; but see *Sooltan* but see *Cahn v. Pockett*, (1899) 1 Q. B. 654.

CHAPTER VI.

The Incidents of Contracts of Sale.

Keeping the foregoing rules of construction in mind, the next point is to consider the general features of the chapter on the sale of goods.

The special characteristics of a contract for the sale of goods are that the property in the goods can pass without delivery, and the seller has certain rights that is a lien for the unpaid price in certain cases and this right is greater than a mere lien. There is also the right to stop goods in transit, which is derived from the law merchant.

§ 103.
Special
features
attaching
to the sale
of goods.

There are no formalities¹ required for the formation of a contract of sale, which in India can be made by parol,² and the only restrictions as to proof are the ordinary rules of evidence requiring the best evidence to be given, that is, if the contract has been reduced to writing, section 91 of the Evidence Act provides that such writing is, subject to the exceptions therein contained, the only evidence of the contract.³

§ 104.
Formation
of the Con-
tract.

But if the writing does not represent the real contract it can be disregarded, and where bought and sold notes were falsified, the Privy Council held that they were not the contract and the real agreement could be proved *aliunde* by other and antecedent materials. Section 92 of the Evidence Act does not apply to such a case. Their Lordships⁴ held the contract could be proved by telegrams and the deficiencies of the telegrams supplied by the broker's evidence : and that there was no necessity to rectify the notes ; the suit should be on the original contract.⁵

¹ Save in the exceptional cases noted in § 119.

² *Durga Prosad Sureka v. Bhajan Lal*, (1904) 81, 1 A. 122.

³ See *Maung Shwe Oh v. Maung Tun Gyaw*, (1904) 31, 1 A. p. 194.

⁴ *Durga Prosad Sureka v. Bhajan Lal Lohia*, (1904) 81 C. 614, 81, 1 A 122 ; and see § 61.

⁵ But this case turned on their Lordships' view of bought and sold notes.

§ 105.
Novation.

Under section 62 if the parties to a contract agree to substitute a new contract for it, or to rescind or to alter it, the original contract need not be performed.¹

But the section has been held not to apply to cases where an agreement to substitute a new contract for the original one is made after breach of the original contract. If in such a case the new agreement is not performed, the liability under the original contract remains.²

It has been held that there must be consideration to support novation.³

And it seems that the new contract must be complete ; and although it is the other party's fault that it is not, he can still enforce the original contract.⁴

Even if a bailee attorns to a buyer and such attornment discharges him as regards the seller, it does not without a contract amounting to novation release the seller from his liability to supply the goods to the buyer in the bailee's default.⁵

The substitution of a new contract for the original requires the same formalities as the original, that is, mutual consent, and can be proved by parol subject of course to section 92 of the Evidence Act.⁶

§ 106.
Remission.

Under section 63 every promisee may dispense with a remit wholly or in part, the performance of the promise made to him or may extend the time for such performance or may accept instead of it any satisfaction which he thinks fit. It has been held that there is no need for

¹ For the definition of novation see *Scarf v. Jardine*, (1882) 7 App. Cas. 345, 351 (H. of L.) ; *Commercial Bank of Tasmania v. Jones*, (1898) A. C. 313.

² *Roushan Bibie v. Hurray Kristo Nath*, (1882) 8 C. 926 ; *Manohur Koyal v. Thakur Dass*, (1888) 15 C. 319.

³ *Trimbak v. Bhagwandas*, (1898) 23 B. 348.

⁴ *Subba Rau v. Devur Shetti*, (1894) 18 M. 126.

⁵ *J. C. Shaw v. Bill*, (1884) 8 M. 38, for such a contract see *Salter v. Williams*, (1841) 10 L.J. C. P. 145 ; *c.f. Smith v. Chance*, (1819) 2 B. & A. 753.

⁶ *Malkarjun v. S. M. Ry. Co.*, (1902) 27 B. 126 ; 4 Bom. L. R. 890, *Darnley v. London C. & D. R.*, L. R. 2 H. L. p. 60 ; as to what amounts to novation, see *Lala Banshidhur v. The Government of Bengal*, (1872) 9 B. L. R. 364 P. C.

consideration¹ under this section, and waiver may be evinced by any conduct inconsistent with the continuance of the right waived.² But there must be satisfaction as well as accord, otherwise the parties are relegated to their original rights.³ § 106.

This section it seems only affords a defence against an alleged breach of the contract and does not affect the validity of the original contract.

Under the English law it is competent for both the parties to an executory contract by mutual agreement without any satisfaction to discharge the obligation of the contract ; the reciprocal discharges are sufficient consideration. But if the contract is executed it cannot be discharged except by a new contract.⁴ Pollock accordingly doubts whether a remission is binding without consideration.

Where there is an agreement for postponement of the time for delivery or payment, it has been held that it, although gratuitous, can be enforced.⁵ It has been suggested that if the request to postpone comes from the promisor the agreement to do so would come under section 62 as being an alteration of the contract, and would therefore require consideration,⁶ for it has been held that under section 135 a mere voluntary promise to give time does not discharge a surety,⁷ but that section only discharges a surety in case of a contract to give time.⁸ It seems clear from the wording of section 63 that such a case comes within its provisions and section 62 does not apply to this particular point. Post-ponement.

¹ *Naoroji v. Kazi Sidick*, 20 B. 636 ; *Abraham v. The Lodge Good Will*, (1910) 20 M.L.J. 383 ; *Abaji Sitaram v. Trimbak*, (1908) 28 B. 66 ; *Davis v. Cundasami*, (1896) 19 M. 398 ; *Guddalur Ruthna v. K. Arumuga*, 7 M. H. C. 189 ; *Goseti v. Varigonda*, 27 M. 368.

² *Shyama v. Heras*, 26 Cal. 160.

³ *Manohur Koyal v. Thakur Dass*, (1888) 15 C. 319.

⁴ *Leake* 564.

⁵ *Davis v. Cundasami*, (1896) 19 M. 398, doubted by Pollock, *Contract Act*, 2nd Ed. 275.

⁶ *Cunningham and Shepperd*, 10th Ed. 224, citing *Trimbak v. Bhagwandas*, (1898) 28 B. 318, which however had nothing to do with a contract, but the rights of a mortgagee to sell.

⁷ *Damodar v. Muhammed*, (1900) 22 A. 351.

⁸ See § 137.

§ 106. If the request comes from the promisee, it has been suggested that the case is not so clear¹ and that there is no agreement to alter the contract and neither section 62 nor section 92 of the Evidence Act apply.²

Consideration.

But it seems that the decisions that an agreement to extend time under section 63 requires no consideration are unsound, for under section 10 an agreement to amount to a contract requires consideration, and under the definition in section 2 to be enforceable an agreement must amount to a contract.

Under section 63 of the Contract Act there can be dispensation or remission only by means of a promise. There must be a proposal of the dispensation or remission which is accepted.³

But it is open to the defendant to show in a suit on an executory contract that it is not binding on him in as much as it is not binding on the plaintiff.⁴

§ 107.
Assign-
ment of
contracts.

The rule in this country as to the assignability of an executory contract for the purchase and the sale of goods is that the benefit of such a contract can be assigned, understanding by benefit the beneficial interest under the contract and the right to enforce it. This rule is subject to certain qualifications, *viz.* (1) that the benefit is not coupled with a liability and (2) that the nature of the contract has not been affected by personal considerations,⁵ and that no greater liability is thereby cast on the promisor.⁶

¹ Cunningham and Shepperd, 10th Ed. 224, citing *Trimbak v. Bhagwandas*, (1898) 28 B. 348, which however had nothing to do with a contract, but the rights of a mortgagee to sell.

² *Ibid.*, citing *Hickman v. Haynes*, L. R. 10 C. P. 598; see however *Shyama v. Heras*, 26 C. 160.

³ *Abaji v. Trimbak*, (1903) 28 B. 65; doubted by Pollock Con-

tract Act, 2nd Ed. 278, on the ground that it is unnecessary to import any such conditions into the section.

⁴ *Ahmedabad v. Sulemanji*, (1903) 27 B. 618.

⁵ *Jaffer Meher v. Budge Budge Jute Mills*, (1904) 10 C. W. N. 755, 33 C. 702 affirmed 34 C. 289.

⁶ *Dawson v. G. N. Ry.*, (1905) 1 K. B. 260, 272.

But the burden of a contract may be assigned with the consent of the contractee¹ and the same rule applies in the case of contracts involving personal considerations.² Such agreements would amount to novation under section 62. A contract for future delivery of goods can be assigned as being an actionable claim under the Transfer of Property Act, section 130.³

§ 107.
Burden.

Where personal considerations are involved section 40 applies. In one case where a carriage was hired from Sharpe trading in his own name, but in fact having a partner, it was held that on Sharpe's retirement the contract ended.⁴ But this was held to be an extreme application of the principle,⁵ which ought to be applied only where the contract really and substantially has relation to the personal conduct of the contracting party.⁶ In an ordinary contract for delivery of goods payment for them and the like may of course be performed by deputy.⁷ There is clearly no personal element in the payment of the price.⁸ It has yet to be decided in India whether the right of a seller to call for payment of the price of goods on delivery is an actionable claim and as such assignable. But the observations

Personal.

Right to
price.

¹ *Tod v. Lakhmidas*, (1892) 16 B. 441; *Harish Chandra v. Chandapore Co.* 30 C. 961; *Tolhurst v. Associated Cement Manufacturers*, (1902) 2 K. B. 660, (1903) C. A. 414.

² *Toomey v. Rama Sahi*, (1890) 17 Cal. 115, 121; *Namasivaya Gurukkal v. Kadir Ammal*, (1894) 17 M. 168.

³ *Jaffer Meher Ali v. Budge Budge Jute Mills*, (1904) 34 C. 289 C. A.; *Hunsraj v. Nathoo*, (1907) 9 Bom. L. R. 838, the earlier case to the contrary was decided before the T. P. Act applied to Bombay; see Specific Relief Act s. 21 b.

⁴ *Robson v. Drummond*, (1831) 2 B. & Ad. 303, 36 R.R. 569, 572.

⁵ *British Waggon Co. v. Lea*, (1880) 5 Q. B. D. 149.

⁶ *Phillips v. Alhambra Palace Co.*, (1901) 1 K.B. 59; *Jaeger v. Walker*, (1897) 77 L.T. 180 C.A.; *Griffith v. Tower Publishing Co.*; (1897) 1 Ch. 21 (author and publisher) cf. *Lucas v. Moncrieff*, (1905) 21 T.L.R. 683.

⁷ *Tod v. Lakhmidas*, (1892) 16 B. 441, 451.

⁸ *Tolhurst v. Associated Portland Cement Manufacturers*, (1902) 2 K.B. 660, but see *Kemp v. Bearselman*, (1906) 2 K.B. 606, approved in *Krishna Jute Mills v. J. Innes*, 21 M.L. J. p. 189.

§ 107. in *Jaffer Meher Ali v. Budge Budge Jute Mills Co.*¹ cover such a case.²

It has been held that a contract cannot be assigned where the other party has a set off against the assignor.³ There is no section in the Contract Act dealing with assignability generally. Section 40 only covers cases involving a personal element.

It seems clear that the burden of the contract cannot be assigned, and certainly it cannot be if the object is fraud,⁴ and in any case not amounting to novation the assignor remains liable to the original contractor, although under section 130⁵ of the Transfer of Property Act the assignee can sue in his own name.

§ 108.
Acceptance
of tenders.

It is convenient to notice here the case of accepted tenders. Where a firm has called for tenders for such goods as they may order at a fixed price for a certain period, the position of a party where tender is accepted is not clear.

Apparently in England there is no obligation on the party who has accepted a tender to give any orders.⁶ Though it was said in one case that there was an implied obligation not to order goods of that kind elsewhere during the term.⁷ But there *R. v. Demers*⁸ was not cited, and the case is doubted by Pollock.⁹

¹ *Supra*.

² In England it can, *Brice v. Bannister*, 3 Q.B.D. 569, so can moneys payable under a personal contract, even if only assigned as a security, *Russell v. Austin*, (1909) 25 T.L.R. 414.

³ *Boulton v. Jones*, (1857) 27 L.J. Ex. 1117.

⁴ *Todd v. Lakmidas*, (1892) 16 B. 441.

⁵ See *Hunsraj v. Nathoo*, (1907) 9 Bom. L.R. 838 C.A., and as to the necessity for writing, T.P. Act 130, and of notice, s. 131, and

as to the exception in favour of negotiable instruments and mercantile documents of title, s. 137, and *Sowcar Lodd v. Lepati Municipality*, 31 M. 534.

⁶ *Burton v. G.N.Ry Co.*, (1854) 9 Ex. 507; *R. v. Demers*, (1900) A.C. 103 P.C.

⁷ *Gloucester Municipal Election Petition*, (1901) 1 K. B. 683, so held in America, *King-Keystone v. San Francisco*, (1905) 82 P. 849.

⁸ Pollock's Indian Contract Act, 2nd Ed. 36.

Unless there is an obligation under the contract on the buyer to give no orders elsewhere there can be no contract.¹ If there is such an obligation, the seller is bound to execute orders.²

After an order is given under the terms of the accepted tender, a contract is made,³ the tender being until then it seems only a continuing offer.³

Until an order is given, it seems the seller can withdraw his tender.⁴ It has not been decided in England whether after an order has been given and carried out, the contractor can then withdraw his tender.⁵ In India it has been held that he can, except as to orders actually given before revocation of his continuing offer.⁶ Benjamin⁷ suggests that the question turns on whether the contract is severable or not ; and considers such cases analogous to continuing guarantees.⁸

But it is difficult to understand how such a contract can be entire.⁹ He further suggests that an order given by the buyer is an acceptance of and consideration for the entire contract if it is entire.¹⁰ But unless the buyer is bound to order all the goods he requires from the contractor, how can the seller be bound to accept any order ? There must be mutuality of obligations.¹¹

¹ *Head v. Diggon*, (1828) 3 Man. & Ry. 97.

² Pollock's Indian Contract Act, 2nd Ed. 36.

³ *G.N. Ry. v. Witham*, (1873) L.R. 9 C.P. 16 ; *Newbridge v. Evans*, (1902) 18 T.L.R. 396.

⁴ Benj. 5th 69. *The Bengal Coal Co. v. Homee Wadia*, (1899) 24 B. 97 C.A. ; *Kundan Lal v. Sec. of State*, (1904) Punj. Rec. No. 72 ; but see *Islington Union v. Brentnall*, 71 J.P. 407, where Grantham, J., held that a tender once it had been accepted could not be withdrawn, on the ground that otherwise the seller could supply or not as the market fell

or rose and the agreement would mean nothing.

⁵ The point was left open in *G. N. Ry. v. Witham*.

⁶ *The Bengal Coal Co. v. Homee Wadia*, (1899) 24 B. 97 C.A.

⁷ 5th Ed. 70.

⁸ See Contract Act s.s. 129, 130.

⁹ See *Chicago v. Dane*, (1870) 43 N.Y. 240.

¹⁰ 5th Ed. addenda to p. 70, citing *Cooper v. Lansing*, (1892) 84 Amer. St. R. 341, which is in conflict with *Chicago v. Dane*, (1870) 43 N.Y. 240.

¹¹ See *Ahmedabad v. Salemanji*, (1903) 27 B. 618, though of course any consideration is sufficient.

§ 108. The American cases cited by Benjamin to support his views are of dubious authority, for according to an American author of note an accepted offer to supply all such goods as shall be needed or consumed on the acceptor's business during a limited time is binding; but an accepted offer to sell or deliver articles at specified prices during a limited time in such quantities as the acceptor may want in his business without indicating the quantity is void for want of consideration and mutuality.¹ Neither of the cases cited by Benjamin are considered in the above passage though cited elsewhere on other points. This greatly detracts from their authority.²

American
law.

The method of construing such accepted tenders as continuing offers or, as the English cases put it, offers, is open to the objection that it renders the whole transaction abortive. The intent of the buyer is to obtain the goods he requires at a fixed price: the object of the seller is to secure the custom of the buyer. If it is open to the seller to revoke the offer whenever the market rises above his price, and to the buyer to purchase elsewhere when the market falls below the fixed rate, why this farce of calling for tenders? As the weight of authority is against implying an obligation on the buyer to purchase at the fixed rate all the goods he requires from the contractor whose tender he accepts (though every ruling as to implying terms would support such implication)³ it is for the commercial community to frame their agreements according to their intent and to leave nothing to implication.

Clause
against
buying
elsewhere.

A clause that the buyer shall not purchase elsewhere during the time fixed will be enforced by injunc-

¹ Parsons Law of Contract, 424. (1906) 9th Ed. Vol. 1. 562, citing

Wells v. Alexandre, 130 N.Y. 642; *Cold Blust v. Kansas*, 114 Fed. 77; *Minnesota v. Whitebreast*, 160 Ill. 85; *Missouri v. Bayley*; 60 Kan.

² See remarks on *Barrow v. Myers* in *Crozier v. Auerback*, (1908) 2 K.B. 161 C. A.

³ See § 62.

tion.¹ Where under such a clause a seller alleging that he had since discovered that the buyers, a railway company, had prior to the end of the contract period ordered quantities far in excess of their current requirements, sued for the difference between the market rate and the contract rate of the excess so ordered and supplied, it was said that the company could not have ordered the goods for works to be commenced after the contract period, and held that it was entitled to order all goods required for works authorised at the date of the agreement.² The agreement³ contained a clause that on the sellers failing to supply goods ordered the buyer might buy against him and charge him with the difference. It seems that until an order was given and not executed such a clause would not be operative, for there is no consideration therefore.²

§ 108.

Clause
authorising
buyers
to buy
against the
seller if he
failed to
supply.

On a reference from the Board of Revenue in Madras a full bench held that an agreement for or relating to the sale of goods does not require to be stamped; see Stamp Act, Sch. 1, 5 (a).⁴ Nor does such an agreement require a stamp although it contains provisions as to warehousing, insurance previous to delivery, and arbitration clauses.⁵ But this does not apply to bought and sold notes, see *Ralli v. Caramalli*,⁶ where bought and sold notes with uncanceled stamps were rejected: clause 5 (a) was held not to exempt such documents because of clause 43.

§ 109.
Stamps.

Certain agreements for sale are void. An agreement by way of wager is void.⁷ Under section 30 the Privy Council

§ 110.
Void
agree-
ments.

¹ *Catt v. Tourle*, (1869) 4 Ch. Ap. 654; *Clegg v. Hands*, (1890) 44 Ch. D. 503; *Kimberley v. DeBeers*, (1897) A. C. 515, but is not a condition, precedent, *Eastern Counties Ry. v. Philipson*, (1855) 16 C. B.

² *Whitehouse v. Liverpool Gas Co.*, (1848) 17 L. J. C. P. 237.

³ Cf. *Simmons v. Millar*, (1899) 15 T. L. R. 100.

⁴ Reference from Board of Revenue, (1886) 10 M. 27 F. B.

⁵ *Kyd v. Mahomed*, (1891) 15 M. 150.

⁶ (1890) 14 B. 102.

⁷ Contract Act, s. 30.

§ 110. held that the Indian and English law are substantially the same. The test they laid down was that if the circumstances are such as to warrant the legal inference that the parties never intended any actual transfer of goods at all, but to pay differences, that is not a commercial transaction, but a wager on the rise and fall of the market.¹ Agreements are not wagering unless it be the intention of both the contracting parties at the time of entering into the agreements under no circumstances to call for or to give delivery.² There must be a common intention to bet.³ Batchelor, J., went so far as to say that the Court should be astute to discover what was the common intention and must probe among the surrounding circumstances.⁴ A party pleading that a transaction evidenced by documents is by way of wager and not a genuine commercial contract, is entitled under section 92, proviso 1, of the Evidence Act, to give parol evidence to substantiate such defence.⁵

§ 111.
Illegal severable from the legal portion.

Where it is possible to sever the legal from the illegal part of the contract, whether the illegality be created by statute or by common law, it is open to reject the bad and retain the good.⁶ But not if by so doing the Court must make a new agreement for the parties.⁷

§ 112.
Sale by estoppel.

There may be a sale by estoppel. In a Calcutta case the view was taken that if one party finally elects to treat a transaction as a completed sale by which the property

¹ *Kong Yee Lone v. Lowjee Nangee*, 5 C. W. N. 714 P. C.; see *Rourke v. Sort*, (1856) 25 L.J.Q.B. 196 (alternative price as a wager); *Forget v. Ostigny*, (1895) A. C. p. 323 (speculative contracts in future).

² *Ajudhea Prosad v. Lalman*, (1902) 25 A. 38; *Tod v. Lakhmi-das*, 16 B. 441.

³ *Sassoon v. Tokersey*, (1904) 28 B. 616 A.C. per Jenkins, C. J.

⁴ *Motilal v. Govindram*, (1905) 30 B. 83.

⁵ *Beni Madhab Dass v. Sada-sook*, (1905) 9 C. W. N. 305 F. B; see *Kong Yee Lone v. Lowjee Nangee*, (1901) 28, 1 A. 239.

⁶ Contract Act, ss. 23, 57, 58; *Mehir Ally v. Sukerkhanoobar*, (1905), 7 Bom. L.R. p. 606 o.c.; see *Bombay Ice Co. v. Fraser*, (1903) 6 Bom. L. R. 28 o.c.; see *Re Gieve*, (1899) 1 Q.B. 794 C. A., see too Lecture on Construction.

⁷ *Kristodhone Ghose v. Brojo Govindo Roy*, (1897) 24 C. 895.

passed, he cannot afterwards say otherwise. But the ground for this seems to have the rules of pleading.¹

The equitable remedy of specific performance² will not as a rule be given in cases of sale of goods unless the chattel is of a peculiar character having a *pretium affectionis*, such as a statue, a picture, a Pusey horn or an old silver tobacco box. In such cases the Court will compel the vendor to deliver to the purchaser the very identical thing agreed to be sold, unless the price is wholly inadequate and the purchaser has taken some unfair advantage of an ignorant vendor.³ In England where the defendants sold timber and agreed to allow the plaintiffs to cut and remove it, it was held that though the Court might be unable to compel the plaintiffs to cut the timber, if they refused to do so, it had jurisdiction to give them relief by way of specific performance on the defendants refusing to carry out the contract and an injunction went to restrain the defendants from preventing the plaintiffs from cutting.⁴

**§ 113.
Specific
perform-
ance.**

The well-known rule at Common Law, that the buyer or seller can recover money paid where the consideration for the payment of it has failed⁵ seems to be covered by section 65 of the Contract Act : illustration (*d*) to that section is an instance of such failure.⁶ But in any case section 75 is sufficient. Section 65 does not depend on the possibility of apportionment.⁴ But it has been held that neither section 64 nor 65 applies where by reason of a breach of warranty (*semble* condition) by one party, the other party is discharged from the performance of his part, but only where the contract is discovered to be or

**§ 114.
Recovery
by buyer
of money
paid when
the consi-
deration
for pay-
ment has
failed.**

¹ *Buchanan v. Auldall*, (1875) 15 B.L.R. 276, 290 A.C.

² See under remedies of buyer.

³ *Falche v. Gray*, (1859) 29 L.J. Ch. 28.

⁴ *James Jones & Sons v. Earl of Tankerville*, (1909) 2 Ch. 440.

⁵ Cf. Sale of Goods Act, s. 54.

⁶ See *Dhuramsey v. Ahmedbhai*, (1898) 23 B. 15; but Pollock doubts whether s. 65 applies to voidable contracts, and thinks s. 75 does : Contracts Act, 2nd Ed., 281.

§ 114. becomes void in law for any of the reasons specified in the Act.¹

Where title to goods fails.

The English cases coming under this head are all good law in India. Where the buyer is deprived of goods owing to the defective title of the seller, he can recover the price paid;² sections 109 and 65 or 75 apply; so too where money is paid for forged scrip,³ bills, or notes⁴ or for shares which are never issued⁵ or for an article which the buyer rightly rejects as not being as described in the contract⁶ the price can be recovered. But the rule does not apply if the buyer gets what he intended to buy though worthless.⁷

§ 115.
Where specific goods perish before delivery.

If specific goods perish after the contract and before delivery, if the destruction was by the fault of the buyer he must pay for them: if by the fault of the seller the buyer can recover the price paid,⁸ whether due at the time of destruction or not. Where neither party is responsible for the destruction if the property has passed, the risk is with the buyer and he cannot recover the price;⁹ if the property has not passed, the English rule is that if the price has been paid, being due before delivery, the seller being excused from performance, the buyer cannot recover it.¹⁰ But in India it seems that the contract to

¹ *Oriental Co. v. Narasimha*, (1901) 25 M. p. 214.

² *Eichholz v. Bannister*, (1864) 34 L. J. C. P. 105.

³ *Westropp v. Solomon*, (1849) 8 C.B. 345.

⁴ *Jones v. Ryde*, (1814) 5 Taunt. 488; *Gurney v. Womersley*, (1854) 24 L. J. Q.B. 46; *Woodland v. Fear*, (1857) 26 L.J. Q.B. 202.

⁵ *Kempson v. Saunders*, (1826) 4 Bing. 5; *Walstab v. Spottiswoode*, (1846) 15 M. & W. 501.

⁶ *Burchfield v. Moore*, (1854) 23 L. J. Q. B. 261; *Gompertz v. Bartlett*, (1853) 28 L.J. Q.B. 65 (unstamped security); *Young v. Cole*, (1837) 3 Bing. N.C.724; *Meyer*

v. Richards, (1895) 163 U. S. 385 (bond unlawfully issued); but see *Sada Kaur v. Tadepally*, (1907) 30 M. 289 and note thereon in para. 522.

⁷ *Lamert v. Heath*, (1846) 15 M. & W. 487; *Laues v. Purser*, (1856) 26 L.J. Q.B. 25; *Begbie v. Phosphate Sewage Co.*, (1875) 1 Q.B.D. 679.

⁸ Benj. 5th Ed. 430.

⁹ See § 86.

¹⁰ Benj. 5th Ed. 430. 143; S. of G. Act s. 7; *Civil Service Co-op. Society v. Gen. St. Nav. Co.*, (1903) 2 K.B. 756 C.A.; *Chandler v. Webster*, (1904) 1 K.B. 473 C.A. subject to any special agreement; *Elliott v. Crutchley*, (1906) A.C. 7.

deliver becomes void in such a case under section 56 and that under section 65 the seller is bound to restore any benefit received under the contract¹: doubtless benefit under the section means actual benefit after allowing for anything reasonably done in performance of the contract, whether the other party benefits thereby² or not. § 115.

The buyer may recover moneys paid under essential mistake³ as for goods no longer in existence⁴ at the time of the contract.⁵ But if the failure of consideration is due to the buyer's fault he cannot recover the price.⁶ If the buyer rightly rescinds the contract he can recover the price paid, under section 75. § 116. Money paid, tender, essential mistake.

If a substantial portion of the thing sold be non-existent it is said⁷ that the buyer has his option to rescind the sale or to take the remainder with a reasonable abatement of the price, but that it is doubtful if he has any right to abate the price unless such abatement is easily ascertainable.⁸ But it seems in India⁹ that the contract would be void under section 56 and on general principles, as the seller could not compel the buyer to take less, the buyer cannot insist on having it¹⁰ unless there is a term to that effect.¹¹ § 117. When only part performance possible.

¹ In Pollock on Contract Act, 2nd Ed. p. 284, s. 65, is said to be limited to cases within s. 56 *sed quare*.

² See § 70.

³ See for principle *Huddersfield Bank v. Lister*, (1895) 2 Ch. p. 281.

⁴ I.e. commercially speaking *Asfar v. Blundell*, (1896) 1 Q. B. 123 (contaminated dates); *Duthie v. Hilton*, (1868) L.R. 4 C.P. 138 (spoilt cement); *Barr v. Gibson*, (1838) 3 M. & W. 400; *Nicholl v. Ashton*, (1901) 2 K. B. p. 133 (wrecked ships).

⁵ Contract Act s. 20, 65, *Strickland v. Turner*, (1852) 7 Ex. 208 (annuity, life expired); *Scott v. Coulson*, (1908) 1 Ch. 453 2 Ch. 249; *Hastie v. Couturier*, (1853) 25 L. J. Ex. 253, 5 H.L.C. 673; *Hanu-*

man v. Hanuman, 19 C. p. 126; *Tulshiram v. Murlidhar*, 26 B. 750; *Venkata v. Peramma*, 18 M. 173.

⁶ *Stray v. Russell*, (1859) 29 L. J. Q. B. 115; *Thomas v. Brown*, (1876) 45 L. J. Q. B. 811.

⁷ 2 Kent Com. 469, cf. Code Napoleon, No. 1601.

⁸ *Farrar v. Nightingal*, (1798) 2 Esp. 639 (leasehold interest).

⁹ But see *Inder Perashad v. Campbell*, (1881) 7 C. 474 and para 573.

¹⁰ *Ahmedabad v. Salemanji*, (1903) 27 B. 618; see for cases where specific performance is obtainable, Specific Relief Act.

¹¹ See Blackburn, 3rd Ed. p. 546, *Simond v. Braddon*, (1857) 26 L.J.C.P. 196.

§ 117. This has been held to be so in cases where the sale depended on the contingency of the goods arriving¹ or being consigned to the seller,² where if the full quantity is not received the buyer cannot demand delivery of what is received. But if the seller delivers or tenders less than the contract quantity, the buyer has his option to accept it and claim compensation unless the seller is excused from delivering the rest.

Pollock³ supports the proposition that a buyer can generally take what he can get, even if he is not bound to accept what the other has to offer⁴ but the cases he cites relate to specific performance of agreements to sell land, which depend on other principles.

¹ *Lovatt v. Hamilton*, (1839) 5 M. & W. 639.

² *Vernede v. Weber*, (1856) 25 L.J. Ex. 326; see to the same effect *Bloomington v. Hewitt*, (1899) 170 N.Y. 568.

³ Pollock on 'Contract,' 8th Ed 573, *Hughes v. Jones*, (1861) 31 L. J. Ch. 83; *Leyland v. Illingworth*, (1860) 2 D.P.J. p. 252.

⁴ *Mortlock v. Buller*, (1804) 10 Ves. p. 315, 7 R.R. 417.

Elements of Contract of Sale.

The Indian Contract Act defines a sale as an exchange of goods for a price.

**§ 118.
Essential
elements
of a sale.**

The elements necessary to constitute a valid sale are

- (1) Parties competent to contract.
- (2) Mutual assent.
- (3) A thing, the ownership of which is transferred from the seller to the buyer.
- (4) A price in money paid or promised.

The first and second are part of the general law of contract and it is not proposed to discuss them here.

The code defines goods in section 76, which provides—

In this chapter the word “ goods ” means and includes every kind of moveable property.

**Section 76.
Goods
defined.**

The definition of “ goods ” is wider than in the English section, and would appear to include, having regard to the definition of “ moveable ” property in section 2 sub-sections 5, 6 of the General Clauses Act (No. 1 of 1868), property of every description except immoveable property, that is not only stocks and shares,¹ but trade marks, patent rights, good-will and all choses in action, and the code applies it seems to such, subject to any special legislation.²

**§ 119.
Goods.**

Certain classes of “ goods ” have been dealt with by special legislation, *i. e.*, British ships, by the Merchant Shipping Act of 1894; bills of Exchange by Act XXVI of 1881; shares in registered companies by Act VI of 1882; patent rights by Act II of 1911 s. 20; copyright by Act XX of 1847 s. 5; bills of lading are dealt with partly by Act IX of 1856 and partly by the law merchant. “ Goods ” apparently

¹ See illustration to s. 80.

² As to choses in action see Transfer of Property Act, ch. VIII.

§ 119. does not include documents of title or the materials in which contracts or documents of title are written the property in which is in general considered as attached to the writing on them.¹ Certain goods have been declared by section 6 of the Transfer of Property Act not to be transferable, such as the chance of succession or of a legacy, or the like ; an easement apart from the dominant heritage, a personal right to enjoy property, a mere right to sue, a public office or the salary of a public officer whether before or after it has become payable, or government pensions. So too dedicated articles are extra commercium.²

Things that
cannot be
sold.

Dedicated
articles.

There can be an agreement to sell goods not in existence at the time of the contract,³ and of goods which at such time were immoveable property if the intention was to sever the thing sold from the soil before sale, as for instance the materials of a house or growing crops.⁴ From the illustrations to section 87 it would seem that the provisions of this chapter can only apply after severance of the thing sold from the soil and when growing crops are sold it is a nice question whether in cases where the Transfer of Property Act requires formalities, and the seller refuses to sever the crops, there is any enforceable contract.

Interest in
land.

In England it has been held that a sale of slag on land adhering to and forming part of the land is not a sale of goods.⁵

Section 77. "Sale" is the exchange of property for a price. It involves the transfer of the ownership of the thing sold from the seller to the buyer.

**Sale de-
fined.**

¹ See Blackburn, 3rd Ed. intro. 667.

VIII.

² *Raja Varma v. Ravi Varma*, (1873) 7 M. H. C. 219 (bench) (1874) 1 M. 235 P. C; *Narasimma v. Anantha* (dedicated articles) 5 M. 391 (4 M. 391); *Gtrijanund v. Sailajanund*, (1896) 23 C. 645,

³ See § 87.

⁴ *Narayana Pillay v. Ramasawmy*, 8 M. H. C. 100. *Vohra v. Ramchandra* (1897) 22 B. 785.

⁵ *Morgan v. Russell*, (1909) 1 K. B. 357 D. C.

The English law only requires consideration of value.¹

Price though ordinarily meaning money also means recompense which may not be in money, the illustrations to section 78 show that price in section 77 means money.² A transfer for anything but money is an exchange.³ Money means and includes according to an Allahabad ruling, not only coin but also bank notes, Government promissory notes, bank deposits, and otherwise and generally any paper obligation or security that is immediately and certainly convertible into cash so that nothing can interfere with or prevent such conversion.⁴

§ 120.
The price must be money.

Meaning of money.

Money paid in rupees can be payment for goods priced in sterling, as payment may be made in any medium agreed upon by the parties.⁵

It is not necessary that the contract should fix the price. If nothing is said section 78 applies and a reasonable price must be paid. The parties may agree that valuers shall fix the price, and then they are bound by their bargain. But it is essential to the formation of the contract that the price should be fixed in conformity with the agreement, and if the persons appointed as valuers fail or refuse to act there is no contract in the case of an executory agreement, even if one of the parties should himself be the cause of preventing the valuation.⁶ But if the agreement has been executed, and the buyer prevents the valuation, the seller will be entitled to recover the value as estimated by a

§ 121.
Price not fixed.
Price to be fixed by valuers.

¹ Blackburn, 3rd Ed. p. 186; but see S. of G. Act s. 54; cf. Transfer of Property Act s. 54.

² *Volkart Bros. v. Vettivelu*, (1887) 11 M. 459; *Emp. v. Appavu*, (1885) 9 M. 141; *Kedar Nath v. Emp.*, (1903) 30 C. 921.

³ Transfer of Property Act s. 118, *Samaratmal. v. Govind*, (1900) 25 B. 696.

⁴ Reference by Board of Revenue, (1881) 3 All. p. 793.

⁵ *Liladhar Jairam v. G. Wre-ford*, (1892) 17, B. 62, 79.

⁶ *Thurnell v. Balbirnie*, (1837) 2 M. & W. 786; *Cooper v. Shuttleworth*, (1856) 25 L. J. Ex. 114; *Vickers v. Vickers*, (1867) 36 L. J. Ch. 946; *Miles v. Grey*, 14 Ves. 400; *Wilkes v. Dens*, 3 Mu. 507.

§ 121. jury.¹ The first case is covered by section 32 of the Contract Act. If the valuers agreed to value for a reward and fail to act, they are liable in damages.² The subject is further discussed under express conditions.³ If parties fix a provisional estimate of the price this is evidence of an intention that the property should pass,⁴ though it may be rebutted by evidence showing that the parties intended a final adjustment of price to be a condition precedent.⁵

Provisional
estimate of
price.

§ 122. An alternative price if in the nature of a wager avoids the contract.⁶ For the law in India see Contract Act, s. 29, Illus. F.

Alterna-
tive price.

In *Morgan v. Nilman*⁷ it was held that there was no contract because the price had to be ascertained in one of two modes, and no election had been made of one or the other.

§ 123. A bill or note given for the price of goods is *primâ facie* only a conditional payment, and in case of dishonour the original debt revives. It is only where the debtor is secondarily liable that the note is a *primâ facie* answer to a claim on the original debt. So when only one partner signed a promissory note and it was not alleged or shown that the creditor intended to substitute the liability of the one for the joint liability of the firm, the partner who had not signed was held liable on the original consideration though not on the note, and it was held that a suit might be brought for the price if the note had not been negotiated.⁸

Payment
by negoti-
able in-
strument.

¹ *Clarke v. Westroppe*, 25 L.J.O. P. 287 (1856), cf. *Batterbury v. Vyse*, 32 L. J. Ex. 177 (1863) (employer colluding with architect).

² *Jenkins v. Beetham*, (1855) 15 C. B. 168, 24 L. J. C. P. 94; *Cooper v. Shuttleworth*, (1856) 25 L.J. Ex. 114; *Turner v. Goulden*, L. R. 9 C. P. 57. (1877).

³ See § 581.

⁴ *Martineau v. Kitching*, (1872) L. R. 7 Q. B. 436; *Farmer's*

Phosphate Co. v. Gill, (1848) 69 Maryl. 537.

⁵ *Logan v. Le Messurier*, (1847) 6 Moo. P. C. 116.

⁶ *Rourke v. Short*, (1856) 25 L. J. Q. B. 196; cf. *Brogden v. Marriott*, (1836) 3 Bing. N. C. 88. and see *Carlill v. Carbolic Co.*, (1892) 2 Q. B. p. 486.

⁷ 3 De G. M. & G. 24.

⁸ *Dargavarapu v. Ramprotapu*, (1901) 25 M. 580 A. C.

Apparently if goods are given in exchange for a bill of exchange negotiated without recourse to the buyer, it is not a sale but an exchange.¹

Payment by negotiable instrument without recourse.

§ 124.
Deposits.

It may be noted that as regards deposits, the law seems to be the same as in the case of immoveable property ;² if the sale goes off owing to the default of the buyer he cannot recover the deposit. If the buyer is justified in refusing to accept the goods, he is entitled to a return of the deposit ; section 75 provides for such cases. The English law is the same.³ The primary purpose of a deposit is to guarantee that the purchaser means business.⁴

Having disposed of a few preliminary questions, the next point to consider is what agreements amount to a sale. There may be a perfectly valid contract relating to the sale of goods, but unless the agreement is such that the property in the goods is thereby passed from the seller to the buyer, the transaction is not a sale.⁵ The passing of the property is the distinguishing feature of a sale of goods and an essential ingredient in every sale. In this respect the definition differs from that of the Sale of Goods Act, section 1, under which it suffices if the seller agrees to transfer. That definition in fact includes a sale and an agreement to sell.

§ 125.
What agreements are sales.

Pothier writing before the code Napoleon objects to a sale being defined as a transfer of property in a thing because he says a man may in good faith sell a thing which is not his own, and if this is so the buyer cannot complain until his possession is disturbed.⁶ But as between the parties to the contract, sale is a transfer of the property in

¹ *Read v. Hutchinson*, 3 Camp. 352 (1813); see further § 300.

² *Bishan Chand v. Radha*, (1897) 19 A. 489; *Ibrahimhai v. Fletcher* (1897) 21 B. 827 F.B.

³ *Howe v. Smith*, (1884) 27 Ch. D. 89 C. A. (History of earnest

and deposit traced at p. 94.)

⁴ *Soper v. Arnold*, (1887) 14 App. Cas. p. 435, 35 Ch. D. 384.

⁵ See Blackburn, 3rd Ed. 1. 133.

⁶ *Of. Contract Act s. 107.*

§ 125. the goods sold.¹ The code Napoleon adopted the present English view.²

The essence of a sale being the transfer of the property in a thing from one person to another, it has accordingly been held that if a man purchase his own goods there is no sale³. There are however quasi exceptions to the rule ; for instance, a man may, if his goods are sold under an execution or distress, become the purchaser,⁴ so a bankrupt may buy back his own goods from his trustee.⁵

§ 126.
Property.

General
and special
property.

In order to understand the subject it is essential to obtain a clear idea of the meaning of the word property. Property is defined by Austin as the right residing in a person called the owner, availing against other persons generally, to use and deal with the thing, the subject of the right, in a manner, and to an extent limited only by the general rules of law, and not by any particular right over the same subject residing in another person.⁶ This definition distinguishes the general property from any special⁷ property residing in another, such as the right of a pledgee,⁸ or of a person possessing a lien over the goods, or of a mortgagee. For in law there may be two owners of a thing, one having the general property,

¹ Cf. *Walker v. Miller*, (1848) 11 Q. B. 478.

² Art. 1583, cf. Italian Commercial Code Act 59.

³ Blackstone's Com., 450; Pothier *Contrat, de Vente* No. 8, cf. *Scotson v. Pegg*, (1861) 30 L. J. Ex. p. 226; *King v. England*, (1864) 33 L. J. Q. B. 145 (a distrainor taking goods at a valuation); *Moore v. Singer Co.*, (1904) 1 K. B. 820 C. A. (distrainor buying at auction goods distrained); in English Law a power to assign goods to self and others is given by the Law of Property Amendment Act 1859. (22 & 23 Vict. c. 35 s. 21.)

⁴ Chalmers, 5th Ed. p. 3.

⁵ *Kitson v. Hardwick*, (1872) L. R. 7 C. P. p. 478.

⁶ The student is referred to the Student's Edition of Austin's *Lecture on Jurisprudence* pp. 177, 387.

⁷ See *Donald v. Suckling*, (1866) L.R. 1 Q.B. 585, 595, 599.

⁸ *Halliday v. Holgate*, (1868) L. R. 3 Ex. 299.; *Jenkyns v. Brown*, 14 Q. B. 496; *Harper v. Goodsell*, (1870) L.R. 5 Q.B. 424; see *Nyberg v. Handelaar*, (1892) 2 Q. B. 202, as to special property between co-owners; see *Sewell v. Burdick*, (1884) 10 A. C. 74 (the special property of an endorsee of a bill of lading).

another having a special property therein. For a sale of goods the seller according to Benjamin must have an absolute or general property in the thing sold and a transfer of the special property is not a sale.¹ **§ 126.**

Thus members of club or voluntary society cannot enter into a contract of sale between themselves with reference to club property or the society's property ; such a transaction is a release of joint ownership, not a sale.³ **§ 127. Clubs.**

Though there may be a sale according to English law³ between one part owner and another or between co-owners,⁴ this would not be a transfer of ownership, and semble is not within the Indian definition. Sir Fredrick Pollock⁵ takes the view that such is a sale within the code ; the question is whether ownership can mean less than the whole ownership ; at any rate as between co-owners it is a release.⁶ **§ 128. Co-owners.**

There may however be a sale of a qualified property as is provided for by section 101 of the Code under which a buyer re-selling goods in transit only transfers the property subject to a right of stoppage ; and a pawner may sell goods pawned, together with all the rights incident thereto. Such a sale transfers the qualified property in the goods.⁷ Apparently therefore a sale may be made of the general property in goods though subject to a special right therein belonging to another.⁸ **§ 129. Sales of qualified property in goods.**

¹ Benjamin, 4th Ed. p. 2, 5th Ed. p. 2. *Sed quære.*

² *Graff v. Evans*, (1882) 8 Q. B. D. 373 ; *Davies v. Barnett*, (1902) 1 K. B. 666 ; cf. *Newman v. Jones*, (1886) 17 Q. B. D. 132 (unauthorised sale by steward to non-member) ; *Baird v. Wells*, (1890) 44 Ch. D. 661 (as to status of member of a proprietary Club).

³ Sale of Goods Act, s. 1. sub s. 1.

⁴ Chalmers, 5th Ed. p. 2, says this was the Common Law ; see S. of G. Act s. 1.

⁵ Second Ed., p. 345.

⁶ *Nyberg v. Handelaar*, (1892) 2 Q. B. 202.

⁷ *Franklin v. Neale*, (1844) 13 M. & W. 481, 11 L. J. Ex. 59 (a case of a pawner selling).

⁸ See Chalmers, 5th Ed. p. 126, citing *Jenkyns v. Brown*, (1849) 14 Q. B. 496.

§ 129. But generally the transfer of the special property is an assignment and not a sale.¹ But it seems that there may be a transfer of a special property in goods between a seller and his factor.²

§ 130.
Property to
be distin-
guished
from
possession.

The right of property in goods must be distinguished from the right to their present possession. The entire right of property may be in one person, while the right to possession is in another,³ as in the case of a lien.

§ 131.
Possession.

Possession is a word of very flexible meaning.⁴ In a certain sense there is a possession in the buyer as soon as the property vests in him according to the contract. For from that moment whatever possession the vendor has he holds in the character of bailee⁵ for the other so far as it is necessary to give effect to the latter's right of property. This is shewn by the fact that the buyer could, if not in default, as soon as the property vested in him, bring trover, an old form of action grounded in the plaintiff's possession. Again the buyer may be put in possession by the goods being delivered to a carrier for him,⁶ and this in law is considered such a possession as to divest entirely the possession of the seller.⁷ But this again is said to be constructive possession, and has been distinguished from actual possession which is not considered to be vested in the buyer until the goods are in his warehouse or in the hands of his agent or servant. For goods in the physical possession of a warehouse man

¹ See however *Bryans v. Nix*, (1839) 4 M. & W. 775 (if the intention of the parties to pass the property whether absolute or special in certain chattels is established and the chattels are given to a depository who assents to hold for the buyer, it is enough).

² See *Bryans v. Nix*, (1839) 4 M. & W. 775; *Anderson v. Clarke*, 2 Bing. 20.

³ See Chalmers, 5th Ed. p.

126; *Mullener v. Florence*, (1878) 3 Q. B. D. 484 C. A.; Blackburn pp. 198, 316; *Milgate v. Kebble*, (1841) 3 M. & Gr. 100; Pollock on Possession, p. 120.

⁴ See also § 237.

⁵ See Campbell, p. 333; see § 245 as to lien.

⁶ Contract Act, s. 91.

⁷ The seller's possession is divested, but not his right to stop in transit.

as trustee for the buyer, are for all practical purposes in the buyer's actual possession.¹ The word possession has been defined in the English Factors Act of 1889 by section 2 "a person shall be deemed to be in possession of goods, where the goods are in his actual custody or are held by any other person subject to his control or for him or on his behalf."² § 131.

A sale is a contract plus a conveyance. For in a sale the general property in the goods is transferred to the buyer, and with it the rights and liabilities attached to the property; he acquires thereby a right *in rem*, a specific interest in the goods themselves of which he may avail himself independently of his remedy against the seller on the contract. In Roman law ownership did not pass until delivery and payment or agreement for credit. In English and Indian law the property may pass without delivery.³ The distinction between a sale and agreement to sell⁴ is shewn by the effect of a breach of contract. If the buyer in a sale refuses to pay, he can be sued for liquidated damages, that is, the price of the goods, but if there were only an agreement to sell them for unliquidated damages *i.e.* the loss occasioned to the seller by the buyer's refusal to complete the transaction. If the seller in a sale refuses to carry out the bargain he can be sued for the goods themselves, whereas in the case of an agreement to sell there is only an action for damages. Then again on a sale, the risk as to the goods is as a rule with the buyer, in an agreement to sell it remains as a rule with the seller.⁵ In an agreement to sell the property remains with the seller, and he can dispose of the goods as he likes although he may § 132.

The difference between a sale and an agreement to sell.

Effect of breach by buyer.

By seller.

¹ See further under Delivery § 247.

² Cf. Contract Act, s. 90.

³ See Blackburn, 3rd Ed. p.

⁴ Sometimes called an executed sale and an executory agreement.

⁵ Risk, § 86.

§ 132. thereby commit a breach of his contract ; they may be taken in execution for his debts ; if he becomes insolvent they pass to the Official Assignee, who may disclaim the contract. In a sale, the property is with the buyer, he can recover the goods themselves, sometimes from third parties.

Property.

§ 133.
Similar
trans-
actions.

Mortgage or
pledge.

Similar transactions which do not amount to sales must be distinguished ; the difference is of importance as the property is not transferred by any other agreement than one amounting to a sale, unless there has been something more than a mere agreement *e. g.* in the case of a gift delivery is necessary. Whether a given contract be a contract of sale or some other kind of contract is a question of substance not of form.¹ Thus it depends on the real meaning and nature of the contract whether it is to be construed as a sale or mere guarantee for the price.¹ A transaction in the form of a contract for sale which is intended to operate by way of mortgage,² pledge,³ charge or other security⁴ will not come within the provisions of this chapter : although any such collateral intention will not affect a *bonâ fide* sale for the motive is immaterial, if in fact there has been a sale.⁵ A mortgage may be defined as a transfer of a general property in goods from the mortgagor to the mortgagee to secure a debt⁶ ; but a sale with a condition for a re-sale to the original seller need have nothing to do with a mortgage.⁷ The distinction between a sale and any other transaction had greater importance in England when the strict form of pleading

¹ Chalmers, 6th Ed. p. 3 ; *Towle v. White*, (1878) 29 L. T. (H. of L.) 78 ; *Hutton v. Lippert*, (1888) 8 Ap. Ca. 309 P. C.

² *Ex parte Harvey*, (1890) 7 Morrell 138 ; *Re Watson* (1890) 25 Q. B. D. 27 C. A. ; *Maas v. Pepper*, (1905) A. C. 102 H. L. English Act. s. 61 (4).

³ *Sewell v. Burdick*, (1884) 10 Ap. Cas. 74.

⁴ *Sec Reid v. MacBeth*, (1904) A. C. 223.

⁵ *McBain v. Wallace*, (1881) 6 A. C. 588.

⁶ *Ex parte Hubbard*, (1886) 17 Q. B. D. p. 698.

⁷ *Beckett v. Tower*, (1891) 1 Q. B. p. 25.

were in use, and now under the special provisions as to formalities which do not apply in India.¹

The change of a Government currency note for money is not a contract of sale,² for it is the exchange of one form of currency for another nor is an exchange of notes³ or of stamps,⁴ nor is payment of wages in liquor a sale of liquor for that is barter.⁵ But foreign money or currency or obsolete coins can be the subject of sale,⁶ and where a Jubilee five-pound piece was sold as a curiosity by a thief it was held that it could be recovered by its owner although it was a current coin.⁷

**§ 134.
Change of
Govern-
ment notes.**

There can be no contract of sale unless the contract contemplates the delivery of a chattel as such, and not merely the affixing of a chattel by the workman to land or to another chattel. It is not a question of the relative value of the materials supplied by the employer or the workman,⁸ but of whether previous to the completion of the chattel the property was vested in the employer or the workman.⁹ Opinions have differed as to the test for distinguishing between a contract for work and materials and a sale, but since the case of *Lee v. Griffin*,⁹ the rule seems to be that if the contract is intended to result in transferring for a price from A to B an article in which B had no previous property "it is a contract of sale."¹⁰ Stephen, J., discussed the distinction in the Law Quarterly¹¹ and considered that "the true principle of these cases appears to be that neither the book when printed nor the

**§ 135.
Sale or
contract
for work
and
materials.**

Test applied.

¹ *Young v. Mathews*, L. R. 2 C. P. 127; Blackburn p. 182, Blackburn p. 15.

² *Emp. v. Jogessur Mochi*, (1877) 3 C. 379; *In re Captain Mitchell*, (1877) 1 C. 339.

³ *Hari Mohun Mullick v. Goburdhun Dass*, 3 C. L. R. 459.

⁴ *Kedar Nath v. Emperor*, (1908) 30 C. 921.

⁵ *Emperor v. Appavu*, (1885)

9 M. 141.

⁶ *In re Mathur Lalbhai*, (1901) 25 B. 702.

⁷ *Moss v. Handcook*, (1899) 2 Q. B. 111.

⁸ *Gregory v. Stryker*, (1846) 2 Denio (N. Y.) 628.

⁹ *Lee v. Griffin*, (1861) 30 L. J. Q. B. 252.

¹⁰ Chalmers 2nd Ed. p. 4.

¹¹ Vol. 1 p. 10.

§ 135. deed when drawn is the absolute property of the printer or solicitor, the author's copyright in the book and the client's interest in the deed qualify their proprietary rights. If the printer, being unpaid, were to sell the copies to a publisher or if the solicitor, not getting his costs, were to threaten to destroy the deed, each could be restrained. A book is more than a bare combination of ink and paper: I should say the material used in making it had ceased to exist as such and that the new product was the property of the employer, subject to the printer's lien and other remedies for the price of his labour.

§ 136.
Sale or
bailment.

Again a sale must be distinguished from a bailment. The test is whether the party delivering is entitled to the return of the specific chattel, if so it is a bailment, if not it is, if the other conditions are present, a sale.¹

Sale or hire.

A hire purchase agreement is not a sale until the conditions are fulfilled.² When goods are supplied on approbation for cash or return, the property does not pass until the condition is fulfilled by payment, and the goods can, if not paid for, be recovered from an innocent pledgee.³

Sale or
pledge.

For the distinction between a sale and a pledge see *Sewell v. Burdick*.⁴

Exchange.

Sale must be distinguished from barter or exchange *i.e.* where goods are given in exchange for goods.⁵ A transfer of goods partly for goods partly for price would not be within the Indian definition. The cases cited by Pollock to shew that it would, refer to English law⁶ and do not support his proposition. In *Aldridge*

¹ *South Australian Ins. Co. v. Randell*, (1869) L. R. 3 P. C. 101, cf. *Comber v. Leyland*, (1898) A. C. p. 530 H. L.

² *Gopal Tukaran v. Sorabji Nusserwanji*, (1904) 6 Bom. L. R. 871.

³ *Weiner v. Gill*, (1906) 2 K. B. 574. See § 494, as to implying

such a term or usage supplying it. See *Whitehorn v. Davidson*, (1910) 80 L. J. K. B. p. 434.

⁴ (1884) 10 App. Cas. 74, in Lower Court 13 Q. B. D. p. 178,

⁵ Benjamin, 5th Ed. p. 3.

⁶ But see Chalmers 6th Ed. p. 5, Benj. 5th Ed. p. 3.

v. Johnson ¹ there were two sales and a set off of prices, and *Sheldon v. Cox* ² turns on old forms of pleading. If the exchange is made for goods or alternatively for a price that is not a sale within the section.³ Similar rules however it would seem apply to a case of barter in England but the law has not been worked out.⁴ In India the Transfer of Property Act, Chapter VI, deals with exchanges and enacts that this chapter on sale of goods shall apply as far as may be to exchanges.

§ 136.

A contract of sale or return was distinguished from a contract of agency in *Ex parte White*.⁵

An award is not a sale.⁶

Award.

An agreement to sell *plus* a license to seize was distinguished in *Reeves v. Whitmore* ⁷ from a sale of future goods.

A transaction may be a matter of agency and not a sale. This depends on the facts, if the consignee of goods is directly liable for the price, it is a sale, but not if he merely guarantees the price.⁸

Sale or agency.

Illustration *b* to the section is the same as section 18, rule 4 of the Sale of Goods Act. The case of goods sold on approval is dealt with later.⁹

Sale or return.

The Contract Act in this chapter only deals with sales properly so called, but there are certain quasi contracts of sale which require to be noted. By a quasi contract of sale is meant a transaction to which, independently of the will of the parties, the law annexes consequences similar to those which result from a sale. A satisfied

§ 137.
Contracts of quasi-sale.

¹ 26 L. J. Q. B. 296 (1857).

Arms Co., (1876) 1 A. C. 682.

² (1824) 3 B. & C. 420.

⁶ *Hunter v. Rice*, (1812) 15

³ See note on *The South Australian Insurance Co v. Randall*, (1869) L. R. 3 P. C. 101 in Benjamin, 5th Ed. p. 8.

East. 100.

⁷ (1864) 33 L. J. Ch. 68.

⁴ Blackburn, 3rd Ed. IX.

⁸ *Ex parte White*, 40 L. J. Bank 73, (1870) L. R. 6 Ch. 397; *Ex parte Bright*, (1879) 10. Ch. D.

⁵ (1870) L. R. 6 Ch. 397, see too *Dixon v. The London Small*

566 C. A.

⁹ See § 157.

§ 137. judgment in trover, trespass or detinue operates as a sale.¹ When a plaintiff has been induced by the fraud of a third party to sell goods to an insolvent buyer, and such third person afterwards obtains the goods himself, the plaintiff may waive the tort, and treat the transaction as a sale to such third party.² So in other cases where a person has wrongfully obtained possession the owner may waive the tort and treat the transaction as a sale.³ So too there may be a sale by estoppel.⁴

§ 138.
Who may
sell.

Generally speaking only an owner can sell goods ; but there are exceptions to this rule for there may be sales by pawnees, by public officers, by Masters of ships in distress, by the Court, by factors, and consignees, and by persons entrusted with possession by the owners. But apart from sales under the exceptions to section 108 of the Contract Act generally a person cannot sell what he does not own for there is no market overt in India.

§ 139.
General
rules to
ascertain
whether an
agreement
amounts to
a sale or
not.

The question as to whether contract amounts to a sale or not, is properly speaking a question depending on the construction of the agreement, for the law professes to carry into effect intention of the parties as appearing from the agreement and to transfer the property when such is the intention of the agreement and not before.⁵

As the parties frequently express their intention obscurely or not at all, the point of importance not being present to their minds, the Legislature and the Courts having discarded the objective test of delivery, have

¹ See Chalmers, 6th. Ed. p. 9. *Ex. p. Drake*, (1877) 5 Ch. D. 866 C. A. p. 871.

² *Hill v. Perrott*, (1810) 3 Taunt. 274; Chalmers 6th Ed. p. 9; Benjamin, 4th. Ed., 58; Roscoe on Evidence, 15th Ed., 493.

³ *Rice v. Reed*, (1900) 1 Q. B. 54 C. A.

⁴ *Cornish v. Abington*, (1859) 28 L. J. Ex. 262 *Coventry*

v. G. E. R., (1888) 11 Q. B. D. 776 (two delivery orders for same goods); cf. *Henderson v. Williams*, (1895) 1 Q.B. 521, 64 L.J. Q.B. 308 (getting delivery order by false pretences); *Farquharson v. King*, (1902) A.C. 825 H.L. Law Quarterly Vol. XVIII p. 159.

⁵ This is the English C. L. and as submitted above holds good in India.

adopted certain rules of construction which are necessarily more or less technical and arbitrary for ascertaining the intention of the parties. § 139.

Sale is affected by offer and acceptance of ascertained goods for a price, or of a price for ascertained goods, together with payment of the price or delivery of the goods ; or with tender, part payment, earnest or part delivery ; or with an agreement, express or implied, that the payment or delivery, or both, shall be postponed. Section 78.
Sale how effected.

Where there is a contract for the sale of ascertained goods the property in the goods sold passes to the buyer when the whole or part of the price or when the earnest is paid or when the whole or part of the goods is delivered.

If the parties agree, expressly or by implication, that the payment or delivery, or both, shall be postponed, the property passes as soon as the proposal for sale is accepted.

Illustrations.

- (a) *B* offers to buy *A*'s horse for 500 Rupees. *A* accepted *B*'s offer, and delivers the horse to *B*. The horse becomes *B*'s property on delivery.
- (b) *A* sends goods to *B*, with the request that he will buy them at a stated price if he approves of them, or return them if he does not approve of them. *B* retains goods, and informs *A* that he approves of them. The goods become *B*'s when *B* retains them.
- (c) *B* offers *A* for his horse 1,000 Rupees ; the horse to be delivered to *B* on a stated day, and the price to be paid on another stated day. *A* accepts the offer. The horse becomes *B*'s as soon as the offer is accepted.
- (d) *B* offers *A* for his horse 1,000 Rupees on a month's credit. *A* accepts the offer. The horse becomes *B*'s as soon as the offer is accepted.

(e) *B*, on the 1st of January, offers to *A* for a quantity of rice 2,000 Rupees to be paid for on the 1st of March following, the rice not to be taken away till paid for. *A* accepts the offer. The rice becomes *B*'s as soon as the offer is accepted.

§ 140.
Common
Law.

Shepherd's Touchstone gives the Common Law as follows:—If one sell me his horse or any other thing for money or other valuable consideration and first the same thing is to be delivered to me at a day certain, and by an agreement a day is set for payment of the money, or secondly all, or thirdly part of the money is paid in hand, or fourthly I give earnest money albeit but a penny, to the seller, or lastly, I take the thing bought by agreement into my possession, where no money is paid, earnest given or day set for the payment, in all these cases there is a good bargain and sale of the thing to alter the property thereof.

In Noy's Maxims¹ the rules are given thus: "In all agreements there must be *quid pro quo* presently, except a day be expressly given for the payment, or else it is nothing but communication.....". "If the bargain be that you shall give me £10 for my horse, and you gave me one penny in earnest which I accept, this is a perfect bargain.....". If I say the price of a cow is £4, and you say you will give me £4, and you do not pay me presently, you cannot afterwards without I will, for it is no contract: but if you begin directly to tell your money if I sell her to another, you shall have your action on the case against me.

These rules remained substantially the law of England until the Sale of Goods Act, with one exception. The maxim of Noy that unless the money is paid "presently" there is no sale except a day be expressly given for payment, was not the modern law.² The modern rule

¹ P. p. 87, 89

² Benjamin, 4th Ed. p. 278; 5th Ed. 314.

was that the consideration was the buyer's obligation to pay the price, *i.e.* the consideration for the transfer is the promise to pay and not the actual payment and the property passed by the agreement. "Generally speaking where a bargain is made for the purchase of goods and nothing is said about payment or delivery the property passes immediately."¹ The very appropriation of the chattel is equivalent to delivery by the vendor, and the assent of the vendee to take the specific chattel and pay the price is equivalent to his accepting possession.²

§ 140.

The reason given for the rule is that where by the contract itself the vendor appropriates to the vendee a specific chattel, and the latter thereby agrees to take that chattel and to pay the stipulated price, the parties are then in same situation as they would be after delivery of the goods in pursuance of a general contract.³

Pollock⁴ holds the view that the section represents the modern Common Law, although it does not show how readily an agreement to give credit will be inferred. Cunningham and Shepherd consider that it revives the necessity of an agreement to postpone payment or delivery in cases where there is neither payment, part payment tender, earnest or delivery⁵ or part delivery.

The correct view seems to be that the section does not revive the old rule for an express agreement, but as it states, requires that in the absence of payment, part payment, tender, earnest, delivery or part delivery there must be an agreement express or implied to postpone delivery or payment; whether such an agreement can be readily implied is another question.

¹ *Simmons v. Swift*, (1826) 5 B. & C. p. 862; *Gilmour v. Supple*, (1858) 11 Moo. P. C. 551; *The Calcutta Co. v. DeMattos*, (1868) 82 L.J. Q.B. p. 328; *Seath v. Moore*, (1886) 11 Ap. Ca. p. 370.

² *Dixon v. Yates*, (1888) 5 B. & Ad. 318, 340.

³ *Dixon v. Yates*, 5 B. & Ad. 340.

⁴ 2nd Ed., 348.

⁵ 10 Ed. p. 279.

§ 140. Pollock's view is unsound, for by the modern Common Law the property passed by the bargain, giving the parties their rights and obligations accordingly,¹ and there was no need to presume any agreement as to credit.² Under this section a contract to sell specific goods for cash, would not constitute a sale:³ nor would it in England unless the parties so intended:⁴ but in India apparently the intention must (in the absence of payment, delivery or, the like) be re-enforced by an agreement express or implied to postpone payment or delivery.

§ 141.
Postpone-
ment of
payment.

The first point to note is as to whether the Court will readily infer an agreement to give credit, *i.e.* to postpone payment.

The rule at Common Law was that if nothing was said as to the time of payment, it was presumed to be a sale for ready money, and if the contract was in writing evidence to show it was a sale in credit was inadmissible.⁵ Blackburn suggests that in modern commercial transaction if nothing is said as to the time of payment, it is to be presumed that there is an immediate obligation to pay the price, with a reasonable time for payment, citing *Simmons v. Swift*,⁶ and noting that if the circumstances show ready money was intended, the old law applies, as in the case of a sale in a retail shop,⁷ but unless the circumstances are against it, it is to be presumed that reasonable credit is to be given.

All the cases in England go to show that an agreement to postpone payment will readily be inferred, although the point is immaterial there. Where nothing is said as to

¹ See illustration (d), when postponement of payment is essential to the sale.

² See *Simmons v. Swift*, (1826) 5 B. & C. 857.

³ See illustration (d).

⁴ *Welner v. Gill*, (1905) 2 K. B. 172, *per* Bray J., where delivery

had been made.

⁵ *Ford v. Yates*, (1841) 2 M. & G. 549; see Noy's maxims pp. 87, 88, 89, cited in Blackburn 3rd Ed. p. 182.

⁶ 5 B. & C. 857.

⁷ *Bussey v. Barnett*, (1842) 9 M. & W. 812.

payment or delivery, it has been held in England that the property passes, that is in the case of ascertained goods, although the buyer cannot take away the goods without paying the price.¹

Earnest is anything given to bind the bargain, and does not lose its character because the same thing might also avail as part payment. Where however the buyer sent bags for the goods, it was held he could not rely on that as earnest, as they were merely sent to facilitate performance of the contract.² But the thing must be given, mere drawing of a coin across the seller's hand does not suffice.³ The comments of Benjamin as to whether giving of earnest passes the property do not apply in this country as the section provides that it does.⁴ The practice of giving earnest is not uncommon in this country.⁵ There cannot of course be any earnest or payment unless it is accepted as well as given as such.⁶

§ 142.
Earnest.

From analogy with cases on immoveable property it would seem that if the bargain goes off by the default of the buyer the earnest is not returnable, otherwise if the default is on the part of the seller.⁷

Return of
Earnest.

An agreement to set off a debt due to the buyer was held not to be part payment under the Statute of Frauds, as earnest or part payment under that Act must be independent of the contract, and the matter rested on intention only.⁸ This decision was followed in *Norton v.*

§ 143.
Part
payment.

¹ *Simmons v. Swift*, (1826) 5 B. & C. 857, 29 R. R. 438; *Seath v. Moore*, (1886) 11 App. Ca. p. 370; Benjamin, 5th Ed. p. 314; *Gilmour v. Supple*, (1858) 11 Moo. P. C. 551; Sec 41 Sale of Goods Act.

² *Summer v. J. Brown*, (1909) 25 T. L. R. 745.

³ *Blenkinsop v. Clayton*, (1817) 7 Taunt. 597; see also *Bach v. Owen*, (1798) 5 T.R. 409; *Goodall v. Skelton*, 2 H. Bl. 316.

⁴ 5th Ed. 336.

⁵ *Soshi Mohun v. Nobo Kristo*, (1876) 4 C. 801; *Alvar Chetti v. Vaidilinga*, (1862) 1 M. H. C. 9.

⁶ Blackburn, 3rd Ed. p. 41.

⁷ *Ibrahimhai v. Fletcher*, (1896) 21 Bom. 827; *Bishan Chand v. Radha Kishan Das*, (1897) 19 A. 489.

⁸ *Walker v. Nussey*, (1847) 16 L. J. 120, 16 M. & W. 302; see *Hooper v. Stephens*, (1835) 4 A. & E. 71; *Hughes v. Paramore*, (1855) 24 L. J. Ch. 681.

§ 143. *Davison*¹ in respect of section 4 of the Sale of Goods Act, where an overpayment in respect of a previous bargain was held not to amount to a part payment. In England under the Statute of Limitations it has been held that there is part payment of a debt where there is an agreement that the goods shall be supplied on account of a debt²; or that the debtor shall board and lodge the creditor in reduction of a debt³; or that the interest of a note should go towards the maintenance of the creditor's child.⁴ But it would seem that in India, having regard to sections 77 and 78, part payment must be in money.⁵

§ 144.
Part deli-
very.

It was held in *Mitchell Reed v. Buldeo Dass*⁶ that in order to see the meaning of section 78 with regard to the delivery of part of the goods it is necessary to go on to section 92, which deals with the point more fully. A delivery of part in order to pass the property must be a delivery in progress of delivery of the whole.⁶ *Sed quære* for section 92, it seems deals with what amounts to delivery and has nothing to do with the passing of the property; it does not say part delivery if not in progress of delivery of the whole, does not pass the property, and section 78 distinctly says that it does. The effect given to part delivery by section 78 seems to be due to an inclination not to discard the Statute of Fraud in its entirety. However section 92 is obscure, but on general principles should not be construed to cut down the effect of section 78.

§ 145.
Conditional
delivery.

The English law is well established that delivery may be conditional. Section 19 of the Sale of Goods Act is declaratory, the Common Law being clear on the

¹ (1899), 1 Q. B. 401 C. A. 68 L. J. Q.B. 265.

² *Hart v. Nash*, (1885) 2 C. M. & R. 337.

³ *Blair v. Ormond*, (1851) 20 L. J. Q. B. 444, 17 Q. B. 423.

⁴ *Bodger v. Arch*, (1834) 10 Ex. 388.

⁵ Though it is probably not essential that it should be money in England for the purposes of s. 4, S. of G. Act, see the *Queen v. St. Michael's*, (1956) 25 L. J. Q.B. 879; *Hart v. Nash*, 2 Cr. Mee. & R. 337.

⁶ (1887), 15 C. 1.

point.¹ The view of the Appeal Court in *Juggernaut Agarwallah v. Smith*,² was that there might be conditional delivery in India. The effect of non-fulfilment of the condition in such a case is to prevent the property passing.³ The delivery must be intentional.⁴

§ 145.
Sales of specific chattels conditionally.

The next three sections of the Contract Act deal with sales of specific goods subject to a condition.⁵

It must be noted that these rules are subject to circumstances indicating a contrary intention. This was the Common Law⁶ and semble they have not been changed.⁷ Sections 80 and 81 are explanatory of section 79, in so far as it relates to ascertained goods.

Section 79 however is not confined to cases in which the seller has to make or finish the goods. Blackburn considers these rules as being in the nature of conditions precedent to the passing of the property.⁸

Where there is a contract for the sale of a thing which has yet to be ascertained, made or finished, the ownership is not transferred to the buyer, until it is ascertained, made or finished.

Section 79.
Transfer of ownership of thing sold, which has yet to be ascertained, made or finished.

Illustration.

B orders *A*, a barge builder, to make him a barge. The price is not made payable by instalments. While the barge is building, *B* pays to *A* money from time to time on account of the price. The ownership of the barge does not pass to *B* until it is finished.

¹ *Brandt v. Bowlby*, (1831) 2 B. & Ad. 982; *Godts v. Rose*, (1854) 17 C.B. 229, 25 L. J. C. P. 61; see too *Weiner v. Gill*, (1905) 2 K.B. 172, (1906) 2 K.B. 574.

² (1906), 83 C. 547, 34 C. 127.

³ *Mirabila, v. Imperial Ottoman Bank*, (1878) 3 Ex. D. p. 172 (H. L.) S. 19 S. of G. Act; *Weiner v. Gill*, (1905) 2 K.B. 172 (1906) 2 K.B. 574.

⁴ *Ex parte Cote*, (1878) L. R. 9 Ch. 27, 43 L. J. Bk. 19), *cf. R. v. Tideswell*, (1905) 2 K.B. 278.

⁵ Under this heading Benjamin treats of goods sold by description, as to which see *infra* § 608.

⁶ Benjamin, 4th Ed. p. 280.

⁷ See *ante* § 96.

⁸ Blackburn, 3rd Ed. 151-152.

§ 145. The section is in accordance with *Muchlow v. Mangles*.¹ The illustration is taken from *Woods v. Russell*.²

Notice. In England the Sale of Goods Act has enacted a new rule that the property does not pass until the buyer has notice that the seller has performed his duty in respect of the goods.³ No such notice is required in India under the Contract Act, nor was it necessary at Common Law.⁴ The section is more especially concerned with unascertained goods and is considered later.⁵

Section 80.
Completion
of sale
of goods
which the
seller is to
put into
state in
which
buyer is to
take them.

Where, by a contract for the sale of goods, the seller is to do anything to them for the purpose of putting them into a state in which the buyer is to take them, the sale is not complete until such thing has been done.

Illustration.

A a shipbuilder, contracts to sell to B, for a stated price, a vessel which is lying in A's yard ; the vessel to be rigged and fitted for a voyage, and the price to be paid on delivery. Under the contract, the property in the vessel does not pass to B until the vessel has been rigged, fitted up, and delivered.

Meaning of
"state."

The state in which the buyer is to take them means in such a state that the buyer is bound to accept them.⁶

Finished.

Section 80 explains the word "finished" in section 79.

§ 146.
When
anything
remains to
be done by
the seller.

Where anything remains to be done on the part of the seller, as between him and the buyer, for the purpose of putting the commodity purchased into a deliverable state, *primâ facie* a complete present right of property has not attached to the buyer. And this is so even after part has been made deliverable and delivered *i.e.* as regards the

¹ 1 Taunt. 318, 9 R.R. 784,
disapproved in *Carruthers v.*
Payne, 5 Bing. 270 ; *Tripp v.*
Armitage, 4 M. & W. 687.

² 5 B. & Ald. 942.

³ See § 18 (2).

⁴ Blackburn, 3rd Ed. 178 Bing.
5th Ed. 319.

⁵ See § 140.

⁶ *Tarling v. Baxter*, (1827) 30
R. R. 355, 5 L.J. (O.S.) K.B. 164,
cf. S. of G. Act, s. 62 (4).

undelivered part where the remainder has to be weighed or otherwise made deliverable before delivery.¹ § 146.

And even if the goods are actually delivered before the act is done², the property does not pass. This rule seems founded on reason.³ In general it is for the benefit of the seller that the property should pass; the risk of loss is thereby transferred to the buyer, and as the seller may still retain the goods as security for the price, the passing of the property is pure gain to him. It is therefore reasonable that when he has still to do anything to the goods before he can call on the buyer to accept them as corresponding to the agreement, that the intention of the parties should be taken to be that the seller must do his part before he obtains the benefit of a transfer of the property. The presumption does not arise if the things might be done after the seller had put the goods in the state in which he had a right to call upon the buyer to accept them. If the acts are to be done by the buyer, there is no reason for delaying the passing of the property, as in that case the buyer would benefit from his own default; accordingly the rule does not apply in such a case.⁴

Goods to be made deliverable.
Reason of rule.

Where the seller does what is necessary the property passes forthwith,⁴ but this only applies where the goods are made specific by the contract itself.

This rule was first laid down in *Rugg v. Minett*,⁵ where the judges regarded it as a hard and fast rule of law. There the buyer purchased 24 lots of turpentine at auction, 22 of them were to be filled up by the sellers out of the remaining two which were then to be measured and paid for according to the quantity found. Three lots were filled up, and then all the lots were burnt. There was no

¹ *Hanson v. Meyer*, (1805) 6 East. 614; *Simmons v. Swift*, (1826) 5 B. & C. 857.

² Sale of Goods Act, s. 18.

³ Cf. S. of G. Act, s. 18 (2).

⁴ *Furley v. Bates*, (1863) 33 L.J. Ex. 43.

⁵ (1809), 11 East, 210, and see cases cited under s. 81.

§ 146. doubt that the subject matter of the sale had been ascer-
Goods to be tained. But it was held that no property had passed
made except as to the 3 filled up lots, for as to the rest the
deliverable. sellers had not done everything which it was for them to
 perform in order to put the goods in a deliverable state.
 So in *Acraman v. Morrice*,¹ where the seller had sold felled
 trees to the buyer, but had to cut off rejected portions and
 deliver the goods to the buyer, it was held that although
 the trees had been marked and measured by the seller and
 paid for by the buyer, no property had passed.

Onus. It was said that it was incumbent on the buyer to make
 out that something remained to be done to the goods by
 the sellers at the time when the loss occurred.¹

 In *Anderson v. Morice* ² it was held that where a cargo
 was sold and payment was to be made by seller's draft
 with documents attached, that no property passed till the
 cargo was complete, that is until the completion of the
 loading, so that the shipping documents could be made
 out, this being a thing to be done by the seller to put the
 goods into a deliverable state.

Effect of It makes no difference if a delivery order for the goods
accepted has been given by the seller and accepted by the bailee,
delivery for until the seller does his part no property passes.³
order.

 Where there was a contract for delivery of a complete
 tank which was not to be attached to the soil, the fact that
 by arrangement it was being made on the premises of the
 ultimate purchaser did not make the incomplete tank the
 property of the ultimate purchaser, or of the other parties
 to the contract.⁴

 It was held in Scotland that the property had not
 passed in a specific crane, although it was to be kept
 until the buyer wanted it to be erected and all that

¹ (1849) 19 L.J. C.P. 57, 8 C.B.
 449.

² (1876), 1 App. Case. 713.

³ *Hanson v. Meyer*, (1805) 6
 East. 614, 8 R. R. 478.

⁴ *Bellamy v. Davey*, (1891)
 3 Ch. 540.

remained to be done was slight alterations which could only be done at the time of erection, and the buyer refused to go on with the contract before the time for erection.¹

The property *primâ facie* passes although the seller may have to do something in relation to the goods after they are in such a state that he can call on the buyer to accept them² or after delivery.³ When by usage the seller has to pay certain warehouse charges after the sale, this has been held not to prevent the property passing.³ Nor would an agreement of a watchmaker to regulate a clock after sale prevent the property passing,⁴ so too where the seller had to release the goods from bond the Court held that the property passed according to the intention of the parties.⁵

§ 147.
Where something is to be done to the goods by the seller after delivery.

Where anything remains for the buyer to do to put the goods into a deliverable state or to ascertain the price, this *primâ facie* does not postpone the passing of the property.⁶ If it only remains for the buyer to weigh the goods in order to satisfy himself as to the price, the property passes at the time of the agreement.⁷

§ 148.
When the buyer has anything to do.

It is not open to the buyer to do what the seller should have done under the contract. If he does, the property does not pass.⁸

¹ *Brown v. Carron*, (1898) 8 S. L. T. 297.

² *Hinde v. Whitehouse*, (1807) 7 East. 558.

³ *Greaves v. Hepke*, (1818) 2 B. & Ald. 131 ; *Hammond v. Anderson*, (1804) 1 B. & P. N. R. 69.

⁴ Benj. 5th Ed. p. 323.

⁵ *Hinde v. Whitehouse*, (1807) 7 East, 558.

⁶ *Kershaw v. Ogden*, (1865) 34 L. J. Ex. 159 ; *Young v. Matthews*, (1866) 36 L. J. C. P. 61 ; *Rugg*

v. Minett, (1809) 11 East. 210, Benjamin 5th Ed. p. 223 ; *Furley v. Bates*, (1863) 2 H. & C. 200 ; *Shoshi Mohun Pal v. Nobo Kristo*, (1878) 4 C. 801, *cf.* illust. (b) to s. 81.

⁷ *Swanwich v. Sothorn*, (1839) 9 A. & E. 895 ; *Gilmour v. Supple*, (1858) 11 Moo. P. C. 551 ; *Shoshi Mohun Pal v. Nobo Kristo*, (1878) 4 C. 801.

⁸ *Acraman v. Morrice*, (1849) 19 L. J. C. P. 57.

§ 149.
Goods to be made.

It is the rule in English Law that where the agreement is that one party shall make or deliver some chattel, no property passes before the chattel is complete and in a deliverable state, unless there be something peculiar in the agreement.¹ In such a case it may be that no individual chattel has been ascertained.

Property passes when intended to.

If the parties so agree, the property may pass in goods appropriated by mutual assent to the contract although there remain acts to be done by the seller before the goods are deliverable. If it appears from the agreement that the parties intended the price to be paid before the goods are put into a deliverable state, that fact affords an argument that the parties intended the property to pass immediately. For whilst the seller is unpaid it is exclusively to his interest that the property should pass, for he gets rid of the risk, but if he is paid partially or entirely, it is to the buyer's interest to obtain the property, for if the seller becomes insolvent, he has, if the property has passed, the goods as security for his money ; if it has not, he can at most share rateably with other creditors.

At a particular stage.

It is open it seems to the parties to agree that a specific article shall be sold and become the property of the purchaser as soon as it has attained a particular stage, though if it is part of the bargain that more work shall be done on the article after it has reached that stage, it affords a strong *prima facie* presumption against its being the intention of the parties that the property should pass. It is a question of construction of the agreement.²

The question turns on the intention of the parties ; such an intention was held to have been evinced in *Furley v. Bates*³ and in *Kershaw v. Ogden*.⁴ In both these cases there had been possession or constructive possession given to the buyer, but the decisions were based on the

¹ *Young v. Matthews*, (1866) Ca. 350, 370, 55 L. J. P. C. 54.
L. R. 2 C. P. 127.

³ (1863) 33 L. J. Ex. 43.

² *Seath v. Moore*, (1886) 11 Ap.

⁴ (1865) 34 L. J. Ex. 159.

expressed intention of the parties. In *Furley v. Bates*¹ the buyer was given a license to cart away the goods.

§ 149.

If the section were read in the same narrow spirit as expounded in *Brij Coomaree v. Salamander Fire Insurance Co.*² the result would be curious, but the illustration suggests that the intention of the legislature was to allow the parties to make their own contract as at Common Law.

Where a delivery order was given for bricks, and the seller's agent told the buyer that all the bricks finished and unfinished in certain clumps were appropriated to the contract, it was held the property passed.³

The illustration⁴ to section 79 refers to a somewhat special case, and it appears that the result would be different if payments had to be made by instalments, and suggests the adoption of the English rule that in such a case the property passes on the payment of the first instalment where such payment is regulated by particular stages of the work. There is a rule of construction in ship building contracts by which the parties are held to have evinced by implication an intention that the property shall pass, notwithstanding the general rule to the contrary,⁵ but of course a different intention may be evinced.⁶

§ 150.
Ships.

In *Muchlow v. Mangles*⁷ a finished barge built to order with the buyer's name painted on it, was held not to have been appropriated to the contract. But this case has been doubted in *Carruthers v. Payne*,⁸ and it does not appear who ordered the name to be painted.

In cases where ships are to be built payable by instalments, the true principle seems to be that the payment of the instalments may be evidence that the purchaser has

¹ (1868), 33 L. J. Ex. 43.

² See § 96.

³ *Young v. Matthews*, (1866) 36 L. J. C. P. 61, L. R. 2 C. P. 127.

⁴ Founded on *Woods v. Russell*, (1822) 5 B. & A. 942, 1 D. & R. 58.

⁵ *Ex parte Lamblon*, (1875) 10 Ch. p. 414; *Seath v. Moore*, (1886) 11 Ap. Ca. p. 385.

⁶ *Sir James Laing v. Barclay*, (1908) A. C. 35 (H. of L. Sc.)

⁷ (1808) 1 Taunt. 318.

⁸ 5 Bing. 270, (1826).

§ 150. approved of the fabric so far as it has been constructed and may therefore, as it were, ratify the appropriation made by the builder ; but it is doubtful if in itself specific appropriation vests the property unless it has that effect by the contract express or implied.¹

Property to
passes at
particular
stage.

But it has been held that though no express provision is made in the contract, the fact that payment is regulated by particular stages of the work with a view to give the purchaser the security of certain portions of the work for the money he is to pay, is equivalent to an express provision that on payment of the first instalment the general property in so much of the vessel as is then constructed shall vest on the purchaser,¹ and once the property has passed subsequent additions made to the chattels, vest in the purchaser.² Moreover it is not essential that a stipulation for payment of an instalment shall be in the original contract, or that the stipulated instalment should be paid. A new covenant that on a payment the property in the unfinished chattel should pass may be validly made during the progress of the work.³

But there must be evidence sufficient to warrant the inference³ that the purchaser has agreed to accept the corpus so far as completed as in part implement of the contract of sale.⁴ Cases where the property was held

¹ *Clarke v. Spence*, (1836) 4 A. & E. 448.

² *Seath v. Moore*, (1887) 11 Ap. Oa. 350, 55 L. J. P. C. 54.

³ Such evidence may be of payment to be by instalments *Woods v. Russell*, (1822) 5 B & A. 942 ; *Clarke v. Spence*, (1836) 4 A. & E. 448 ; *Laidler v. Burlinson*, (1837) 2 M & W. 602 ; *Wood & Bell*, (1856) 5 E. & B. 772 , 6 E. & B. 355 ; of the signing by builder of certificate for registering in buyer's name: *Woods v.*

Russell, supra ; of supervision by buyer : *Woods v. Russell*, supra ; *Clarke v. Spence*, supra ; *Wood v. Bell*, supra ; *Seath v. Moore*, (1886) 11 Ap. Oa. 350 ; of dealing by buyer with builder's consent : *Wood v. Bell*, supra ; of admissions by builder : *Wood v. Bell*, supra ; of payment not appropriated to stages of the work, *Laidler v. Burlinson*, supra ; *Seath v. Moore*, (1886) 11 A. C. 350.

⁴ *Seath v. Moore*, (1887) 11 Ap. Ca. 350, 55 L. J. P. C. 54.

not to have passed are noted *infra*¹; and to have passed, *infra*.² § 150.

But this rule does not apply to materials intended for and marked for incorporation in the ship until they are affixed to or in a reasonable sense made part of the structure, unless there is an agreement for the sale of the materials separatim; even if the contract provide that that such materials are to be the purchaser's property they are not appropriated to the contract or sold.³ § 151. Materials.

For unless there is in a contract something to indicate a sale of materials as distinct from the ship, the property in materials however much assigned to the ship does not pass.⁴

A mere license in such a contract authorising the purchaser, in the event of the contractor not completing his work by the stipulated time, to use such of the materials of the contractor as shall be applicable to that purpose, will not give the purchaser any property in such materials⁵ even if he has taken possession of such materials.⁶ License to use.

For cases where the unattached materials collected for the ship were held not to have passed, see *infra*.⁷

The rule does not apply to materials to be fitted to a ship already in existence⁷; such on attachment become

¹ *Laidler v. Burlinson*, (1837) (1887) 11 Ap. Ca. 350.

² *M. & W.* 602; *Bellamy v. Davey*, (1891) 3 Ch. 540, 60 L. J. Ch. 778; ⁴ *Reid v. Macbeth*, (1904) A. C. 223.

Laing v. Barclay, (1908) A. C. 35. ⁵ *Baker v. Gray*, (1856) 17 C. B. 462, 25 L. J. C. P. 161.

³ *Clarke v. Spence*, (where there was a special contract) (1836), 4 A. & E. 448, explained in *Tripp v. Armitage*, 4 M. & W. 687; *Woods v. Russell*, (1822) 5 B. & Ald. 942, doubted in *Seath v. Moore*, (1887) 11 Ap. Ca. 350; see *Goss v. Quin-ton*, (1842) 3 M. & G. 825; *Ex. p. Lambton*, (1875) 10 Ch. Ap. 414. ⁶ *Tripp v. Armitage*, (1839) 4 M. & W. 687; *Baker v. Gray*, (1856) 25 L. J. C. P. 161; *Wood v. Bell*, (1856) 25 L. J. Q. B. 321, doubted by Blackburn, 3rd Ed. 199; see *McBain v. Wallace*, (1881) 6 Ap. Ca. 588.

⁷ *Reid v. Macbeth*, (1904) A. C. 223, following *Seath v. Moore*, *Anglo-Egyptian Navigation Co. v. Rennie*, (1875) L. R. 10 C. P. 271, 44 L. J. C. P. 180.

§ 151. the property of the shipowner. The same reasoning however will apply to other chattels as to ships as to which the parties have agreed that the property shall pass while the chattel is in an incomplete state.¹

The special point in ship building contracts is that there is a presumption of such intention ; but the whole matter is a question of intention to be gathered from the particular agreement.²

Section 81.
Completion
of sale of
goods, when
seller has
to do any-
thing there-
to in order
to ascertain
price.

Where anything remains to be done to the goods by the seller, for the purpose of ascertaining the amount of the price, the sale is not complete until this has been done.

Illustrations.

- (a) *A*, the owner of a stack of bark, contracts to sell it to *B*, weigh and deliver it, at Rs. 100 per ton. *B* agrees to take and pay for it on a certain day. Part is weighed and delivered to *B* ; the ownership of the residue is not transferred to *B* until it has been weighed pursuant to the contract.
- (b) *A* contracts to sell a heap of clay to *B* at a certain price per ton. *B* is, by the contract, to load the clay in his own carts, and to weigh each load at a certain weighing-machine, which his carts must pass on their way from *A*'s ground to *B*'s place of deposit. Here, nothing more remains to be done by the seller ; the sale is complete, and the ownership of the heap of clay is transferred at once.

§ 152.
Anything
to be done
by seller
to ascer-
tain the
price.

Although the sale is for specific goods in a deliverable state, if the seller is bound to do anything to the goods for the purpose of ascertaining the price, the property does not pass until this has been done.

¹ *Seath v. Moore*, 11 Ap. Ca. p. 385 ; *Young v. Matthews*, (1866) 36 L. J. C. P. 61.

² *Laing v. Barclay*, (1908) A. C. 35.

This rule and the rule laid down in section 80 frequently overlap.

§ 152.

The English Code specifies the sort of act that the seller may have to do—weighing, measuring or testing. The first illustration is taken from *Simmons v. Swift*¹ and the second *Furley v. Bates*.² This rule in England was regarded in one case as an inflexible rule of law³ but in modern times the rule depends on the presumed intention of the parties, and if the circumstances show an intention to pass the property, that intention will be effective.⁴

Price to be ascertained.

The editors of Blackburn,⁵ consider the rule as being devoid of reason: and point out that as a general rule both parties must concur in the weighing when the price is to depend on the weight, and that there is no reason why the buyer by delaying should obtain a benefit. As regards this point in *Simmons v. Swift*,⁶ it was said that the property could not pass because the concurrence of the seller was necessary in the act of weighing. But these remarks are, it seems, founded on the original observations of Blackburn who inaccurately stated that the rule applied to all cases even when the buyer had to do the act. But at Common Law it was subsequently established that it is immaterial what the buyer has to do if the seller has nothing to do.⁷ And Blackburn's reasoning accordingly is not to the point. Further if the vendor has to do anything after delivery, the property will nevertheless pass.⁸

After delivery.

¹ (1826) 5 B. & C., 857.

⁵ 3rd. Ed. p. 186.

² (1863) 2 B. & C., 200, reported sub nomine *Furley v. Bates*, 33 L. J. Ex. 43.

⁶ (1826) 5 B. & C., 857.

³ *Zagury v. Furnell*, (1809) 2 Camp. 240; see *Simmons v. Swift*, (1826) 5 B. & C., 857.

⁷ *Gilmour v. Supple*, (1858) 11 Moo. P. C. 551.; *Furley v. Bates*, (1863) 33 L. J. Ex. 43; *Shoshi Mohum Pal v. Nobo Kristo*, (1878) 4 O. 801.

⁴ *Furley v. Bates*, (1863) 33 L. J. Ex. 43; *Kershaw v. Ogden*, (1865) 34 L. J. Ex. 159.

⁸ *Hammond v. Anderson*, 1 B. & P. N. R. 69; *Greaves v. Hepke*, (1818) 2 B. & Ald. 181.

§ 152. The reason of the rule seems to be that until the act is done the goods presumably will not be delivered and presumably cannot be, for the seller does not know what he can charge for them. Generally speaking the property in goods does not pass until the seller is in a position to deliver them. If he still has to do anything to the goods, presumably he does not intend to give the buyer possession, which being given might deprive him of the opportunity to do anything to the goods at all. Where 289 bales of goat skins were sold, at so much per dozen skins and it was the custom of the trade for the seller to count the skins, and this had not been done when a fire destroyed the goods, it was held the property had not passed.¹

Part
delivery.

Although there has been part delivery the rule applies to the remainder. Where a parcel of starch was sold at £6 a cwt., and the seller directed the warehouseman to weigh and deliver it ; it was held although part had been weighed and delivered, the property in the rest had not passed, as the act of weighing was in the nature of a condition precedent to the passing of the property, because the price was made to depend on the weight.²

In *Simmons v. Swift*,³ a specified stack of bark was sold at so much a ton ; part was weighed, paid for and taken away. It was held that the property in the residue had not passed because it had not been weighed and the concurrence of the seller in the act of weighing was necessary.

In one case ⁴ in the Appeal Court it was said *obiter* that where a whole flock of sheep was sold at so much a head and the seller's bailiff had to count the sheep, the exact number being uncertain, the property passed at once. The case seems to turn on the intention of

¹ *Zagury v. Furnell*, (1809) 2 Camp. 240.

² *Hanson v. Meyer*, (1805) 6 East. 614.

³ (1826) 5 B. & C. 857

⁴ *R. v. Tideswell*, (1905) 2 K.B. 273 doubted by Benjamin 5th Ed. addenda to p. 320.

the parties : but is certainly against authority, and conflicts with section 81 of the Contract Act and section 18, rule 3, of the Sale of Goods Act.

§ 152.

Where all that remains is to calculate the price from figures obtained by measuring or weighing, that does not prevent the property passing, for the seller has nothing further to do to the thing sold, as for instance where all the figures of measurements of goods sold at so much a cubic foot were written on a piece of paper, but the whole had not been added up.¹

§ 153.
Where only a calculation to be made from measurements.

As in the case of the rule under section 79, the fact that the buyer has to do anything is immaterial.²

§ 154.
Buyer to do anything.

The rule depends on the intention of the parties, and so although the price is not exactly calculated, yet the intention may be that the property should pass, and the fact that a provisional estimate of the price is made was held to be evidence of an intention,³ that the passing of the property in specific goods should not depend upon the weighing to fix the exact amount. Though this presumption may be rebutted by evidence that a final adjustment of the price was intended to be a condition precedent to the passing of the property.⁴

Provisional estimate of price.

It is to be noticed that sections 79, 80, 81, lay down rules which are not exactly on the footing of ordinary conditions precedent. For in the cases of conditions precedent, the promisee can always waive the condition, and it has never been suggested that a buyer can waive the ascertainment of the goods, which it stands to reason he cannot, nor even in the case of specific goods can the buyer waive any of the conditions mentioned in these sections : for it has been held that the buyer cannot by doing what the seller ought to have done, pass the

§ 155.
Under sections 79, 80, 81, Conditions not ordinary conditions precedent.

¹ *Tansley v. Turner*, (1835) 2 Bing. N. C. 151, 2 Scott 238; *Cooper v. Bill*, 3 H. & C. 722.

(1858) 11 Moo. P. C. 551.

³ *Martineau v. Kitching*, (1872) L. R. 7 Q. B. p. 449.

² *Swanwick v. Sothorn*, (1889) 9 A. & E. 895; *Gilmour v. Supple*,

⁴ *Logan v. Le Mesurier*, (1847) 6 Moo. P. C. 116.

§ 155. property to himself.¹ Further it has been held that the property does not pass if the buyer prevents the seller from finishing the goods sold.² The reason seems to be that a sale depends on the assent of the other party, and the property cannot pass without such assent, however wrongful refusal to assent may be. The only way to pass the property in such case is by a special agreement that it shall pass.

§ 156. **Goods sold by description.** Benjamin treats under the heading of conditional sale of ascertained goods, in addition to cases covered by sections 79, 80, 81, goods sold by description, and goods delivered on approval. The first subject is dealt with under the heading of conditions, though Benjamin is more accurate in treating such cases as being cases of failure or not to perform the contract.

§ 157. **Sale or return.** When goods are delivered to the buyer on approval or on other similar terms³ the property therein passes to the buyer,⁴ under the English Law, (a) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction⁵; (b) If he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods on the expiration of such time and if no time has been fixed on the expiration of a reasonable time.⁶ What is a reasonable time is a question of fact.⁷

So too the property passes if the buyer makes the return impossible by his own act or default or if he cannot return the goods owing to the fraud of a person to

¹ *Acraman v. Morrice*, (1949) 19 L. J. C. P. 57; see *Gabarron v. Kreeft*, (1867) L. R. 10 Ex. 274.

² *Brown v. Carron*, (1898) 8 S. L. T. 297.

³ Sale or return was distinguished from agency in *Weiner*

v. Smith, (1910) 1 K. B. 295.

⁴ See *Durga v. Bhajan*, (1904) 81 I. A. 122.

⁵ *Ex parte Wingfield*, (1879) 10 Ch. D. 591.

⁶ S. of G. Act s. 18 (4).

⁷ See S. of G. Act s. 56.

whom he has entrusted them,¹ unless such bailment is consistent with the terms of the original contract.² § 157.

The right to return the goods is not lost when they have been injured³ or have perished⁴ without the buyer's fault before the time fixed for their return, or if no time is fixed before a reasonable time has elapsed.⁵ But a bailee may be responsible for the price, although the goods perish without his fault, by custom of trade.⁶ Goods perishing.

If the time for return has expired before the goods are returned, the seller can sue for the price.⁷ But such time runs from the actual receipt of the goods by the buyer.⁸

In India illustration (b) to section 78 shows that by retaining the goods with the intention of accepting them the property passes.

Under the Common Law the mere non-return passed the property and notice of rejection apparently had no effect.⁹ The Sale of Goods Act seems to have altered this by section 18(b).¹⁰ In India under section 117, there is no need to return rejected goods, and looking at section 118 it seems notice of rejection is all that is required. But it depends on the terms of the contract.² Contracts for sale or return generally mean that the goods are to be taken as accepted unless returned within a reasonable Effect of non-return. Notice of rejection.

¹ *Ray v. Barker*, (1879) 4 Ex. Div. 279 C. A., as to the risk in such cases see § 227; *Elphick v. Barnes*, (1880) 5 C. P. D. 321; *Chapman v. Withers*, (1888) 20 Q. B. D. 824.

² *Weiner v. Gill*, (1905) 2 K. B. 172, 74 L. J. K. B. 845 (1906) 2 K. B. 579 C. A.

³ *Head v. Tattersall*, (1871) L. R. 7 Ex. 7 (a horse).

⁴ *Elphick v. Barnes*, (1880) 5 C. P. D. 321, 49 L. J. C. P. 698. See *Chapman v. Withers*, (1888) 20 Q. B. D. 824, 57 L. J. Q. B. 457 (impossibility of returning a

horse within time in consequence of injuries received).

⁵ As to reasonable time see *Beverley v. Lincoln*, (1887) 7 L. J. Q. B. 113; *Moss v. Sweet*, (1851) 20 L. J. Q. B. 167, 16 Q. B. 493.

⁶ *Bevington v. Dale*, (1902) 7 Com. Cas. 112.

⁷ *Marsh v. Hughes*, (1900) 16 T. L. R. 376.

⁸ *Jacobs v. Harback*, (1885) 2 T. L. R. 419.

⁹ *Moss v. Sweet*, (1851) 16 Q. B. 493, see Benj. 5th Ed. 332.

¹⁰ Cited above p. 156.

§ 157. time.¹ In India it seems notice of rejection will be enough unless the burden of returning the goods is imposed by the contract.

Section 118 shows what acts amount to acceptance.²

When the party is entitled to make trial of the goods anything more than a reasonable trial will pass the property.³

When
property
passes.

The seller's offer in such a case is irrevocable, his only remedy is to sue for the value of the goods retained.⁴ When, however, the contract was for sale for cash or return, the property to remain with the seller, the seller was held entitled to recover the goods from an innocent pledgee,⁵ for the special terms of the contract may exclude any intention to pass the property.⁵ Although generally the contract is for credit⁶ it need not necessarily be so.⁵

§ 158.
Goods to be
delivered
at a parti-
cular place.

Undoubtedly a contract of sale may make actual delivery to the buyer or at a particular place⁷ a part of the bargain, and no property or risk may pass until such delivery.⁸ For instance the property in specific goods bought in a shop to be paid for on delivery does not pass before delivery.⁹

¹ *Moss v. Sweet* supra, cited in *Weiner v. Gill*, (1906) 2 K. B. p. 581 C. A., but see *Swain v. Shepherd*, (1832) 1 M. & Rob. 223.

² See *Kirkham v. Attenborough*, (1897) 1 Q. B. 201.

³ *Elliot v. Thomas*, (1838) 3 M. & W. 170; *Lucy v. Mowlet*, (1860) 29 L. J. Ex. 110; *Okell v. Smith*, (1815) 1 Strakie. 107.

⁴ *Kirkman v. Attenborough*, (1897) 1 Q. B. 201, 208 (O. A.)

⁵ *Weiner v. Gill*, (1906) 2 K. B. 574 A. C. But this case turned on the part that the party pledging was not a mercantile agent as to which see under s. 108.

⁶ *Kirkham v. Attenborough*, (1897) 1 Q. B. 201.

⁷ Contract Act ss. 38 & 80, illus.,

S. of G. Act s. 33; *Hale v. Rawson*, 4 C.B. N.S. 85; *Paynter v. James*, (1867) L.R. 2 C.P. 348; *Brandt v. Bowlby* 2 B. & Ad. 932, as to the risk in such cases see *Beer v. Walker*, (1877) 46 L.J. C.P. 677; *Bull v. Robinson*, (1854) 10 Ex. 342 (delivery on board a condition precedent).

⁸ *Dunlop v. Lambert* (1838) 6 C. & F. p. 621 (H.L.); *Wheeler v. Pearson*, (1857) 5 W.R. 227 (Eng.).

⁹ Per Cockburn, C.J. in *Calcutta Co. v. De Mattos*, (1863) 32 L.J.Q.B. 322, 328; 33 L.J.Q.B. 214, see *Badische v. Basle Chemical Works*, (1898) A. C. 207, 11 Sm. L.C. 9th Ed. 166, Benj. 5th Ed. 322, 355; but see *Ex parte Pearson*, (1868) L. R. 3 Ch. 443, doubted in Benj. 5th Ed. 355.

Where the contract is to deliver unascertained goods F.O.B.¹ free alongside² or C.I.F., it seems that delivery on board or alongside is an essential term of the bargain. Apparently delivery at the port of destination is not a part of such contracts ; it has been frequently held that C.I.F. cash against documents involves no such delivery,³ though recently the Court of Appeal held that a contract C.I.F. net cash gave the buyer an option to demand delivery to himself⁴ : *sed quaere*, for if that were so, why should the buyer pay for the insurance.⁵

§ 158.
F. O. B.
C. I. F.

Under the English law, as Cockburn C.J.⁶ put it, "there is an obligation on the part of the vendor not only to transfer the property in the thing sold but also to deliver possession to the buyer." And a tender of delivery entitling the vendor to payment of the price must in the absence of a contractual stipulation to the contrary be a tender of possession,⁷ and not merely of constructive possession by delivery to a carrier, but if the goods are at sea it is enough to tender⁸ a bill of lading. But in India under section 91, shipment or the like has the same effect

Goods at sea.

¹ See argument in *Biddell v. Clemens*, (1911) 1 K. B. 934 C. A. and in *Parker v. Schuller*, 17 T.L.R. p. 300, *per* Pollock C. B. in *Brown v. Hare*, (1858) 27 L.J. Ex. 372, 29 L.J. Ex. 6 ; *Ogg v. Shuter*, (1876) 1 C.P.D. 47.

² *The Calcutta Co. v. DeMattos*, (1863) 32 L.J. Q.B. p. 328, 33 L.J. Q.B. 214 *per* Cockburn C.J. ; *Stock v. Inglis*, (1885) 10 A.C. 263, 12 Q.B.D. 564.

³ *Parker v. Schuller*, (1901) 17 T. L. R. 299 C. A. ; *Wanche v. Wingren*, (1889) 58 L.J.Q.B. 519 ; *Crozier v. Auerbach*, (1908) 2 K.B. 161 C. A., overruling *Barrow v. Myers*, (1888) 4 T.L.R. 441. The decision in these cases that on failure to ship the right goods or

any goods at all under a C. I. F. contract no part of the breach occurred within the jurisdiction of the English courts seems doubtful, for the seller ought to tender the documents to the buyer; see *Parker v. Schuller* *supra*.

⁴ *Clemens v. Biddell*, (1911) 1 K.B. 934 C. A.

⁵ *Ibid.* *per* Kennedy, L. J. (dissenting), citing *Tregelles v. Sewell*, (1862) 7 H. & N. p. 579, since approved in H.L. reversing the C.A. (1911) 28 T. L. R. 42.

⁶ *Calcutta Co v. De Mattos*, (1863) 32 L.J. Q.B. 322.

⁷ *Clemens v. Biddell*, (1911) 1 K.B. 934 C.A.

⁸ *Ibid* in H. L. (1911) 28 T.L.R. 42 reversing C. A.

§ 159.

as delivery to the buyer if the goods are sold. If by shipment there has been an irrevocable determination of an election under section 84¹ the property in unascertained goods would pass and the goods be sold. Accordingly in India the presumption is that shipment is delivery and *semble* entitles the seller to payment, but the parties may make what contract they please² and it may be for delivery to the buyer and not merely to the carrier.

§ 159.
Hire
purchase
agree-
ments.

In hire purchase agreements as for instance contracts for the hire and conditional sale of furniture, the price to be paid by instalments, the property in the furniture does not pass until all the instalments are paid³; and this is so although the party hiring the goods give a promissory note for their full value as collateral security.³ Such agreements⁴ must be construed as a whole, and the property in a hired chattel may pass in spite of an express provision to the contrary, if such provision is qualified by other parts of the contract; for any conditions inconsistent with the intention that the property should not pass would be given effect to in preference to a mere expression of intention in words.⁵ The owner of the goods under a hire-purchase agreement has made an irrevocable offer to sell.⁶ *Primâ facie* the provision as to payment by instalments is for the buyer's benefit and presumably he may anticipate the payments and so vest the property in the goods in himself on full payment.⁷

Offer
Irrevocable.

¹ See § § 186, 187.

² *Moll Schutte v. Luchmi Chand*, (1898) 25 C. 505 F.B.

³ *Gopal Tukaram v. Sirabji*, (1904) 6 Bom. L.R. 871, see *Ex. p. Crawcour*, (1878) 9 Ch.D.419 C.A. where the agreement so provided, but Benjamin approves of the rule as stated in the text, 5th Ed. 327.

⁴ *Muirhead v. Dickson*, (1905) 7 F. 696. But such agreements

must be distinguished from actual sales for payment by instalments *Maas v. Pepper*, (1905) A.C. 102; *Brooks v. Beirnsstein*, (1909) 1 K.B. 92.

⁵ *McEntire v. Crossley*, (1895) A. C. 463.

⁶ *Helby v. Matthews*, (1895) A. C. p. 477.

⁷ *Lancashire Waggon Co. v. Nuttal*, (1880) 42 L.T. 465 C.A.

The hirer is not a person who has agreed to buy goods unless he is under a binding contract to buy them. An option to purchase is not sufficient.¹ A sale by a hirer with an option to purchase does not pass a good title under section 108 of the Contract Act.² § 159.

The usual provision is that unless payments are regularly made the seller can retake the goods and all payments are forfeited. Whether such forfeiture would be valid is doubtful: probably not under section 64.³ In America at law such forfeiture is good, but not at equity.⁴ Forfeiture.

In the case of a sale of specific goods the seller may by the terms of his contract reserve the right of disposal.⁵ Even after delivery the seller can recover his goods from the buyer if the latter has failed to comply with a condition precedent to his right to hold possession, as where delivery was conditional on certain bills being taken out of circulation,⁶ or where delivery is made by mistake without payment,⁷ or where delivery is taken without complying with the terms of the contract as to payment.⁸ Other instances of this rule are found in cases where the seller in shipping specific goods reserves the right of disposal,⁹ though this usually occurs in the case of unascertained goods.¹⁰ § 160. Conditional delivery.

¹ *Helby v. Matthews*, (1895) A. C. 471; distinguishing *Lee v. Butler*, (1893) 2 Q. B. 318; see *Hull v. Adams*, (1895) 65 L.J.Q.B. 114.

² *Greenwood v. Holquette*, (1873) 12 B.L.R. 46, 47.

³ See *Re Dagenham*, (1873) L.R. 8 Ch. 1022; *Cornwall v. Henson*, (1900) 2 Ch. p. 304.

⁴ Beach 165, *Lincoln v. Quynn*, 68 Md. 297.

⁵ Cf. S. of G. Act s. 19.

⁶ *Bishop v. Shillito*, (1919) 2 B. & Ald. 329.

⁷ *Loeschman v. Williams*, (1815) 4 Camp. 181; see *Cohen v. Foster*, (1892) 61 L.J.Q.B. 643; *Ex parte Catling*, (1873) 29 L.T. 481.

⁸ *Brandt v. Bowlby*, (1831) 2 B. & Ad. 932; *Shepherd v. Harrison* (1871) L.R. 5 H.L. 116, L.R. 4 Q.B. 196, 493.

⁹ See *Brandt v. Bowlby*, (1831) 2 B. & Ad. 932; *Shepherd v. Harrison*, (1869) L.R. 4 Q.B. 196, 498, (1871) L.R. 5 H.L. 116; *Barrow v. Coles*, (1811) 3 Camp. 92.

¹⁰ § 198.

**§ 161.
Present
sale of
future
goods.**

It must also be observed that the seller sometimes purports to effect a present sale of future goods. Such a contract operates as an agreement to sell the goods,¹ for there cannot be a prophetic conveyance.² The property in the goods cannot pass immediately,³ but it will if the seller by some act after his acquisition of the goods clearly shows his intention of giving effect to the original agreement or if the buyer obtains possession under an authority to seize them.⁴

And in England it is said to be the rule that in certain cases where the future goods can be sufficiently identified, the property will pass without any new act intervening.⁵

But in the case cited a builder agreed to lease land and build houses on it, and that all building and other materials brought on the land by the lessee whether affixed to the freehold or not should become the lessor's property. It was held that all such materials when brought on to the land became the lessor's in law.⁶

It seems that in India section 87 covers such a case and although a valid equitable assignment may result,⁷ the property cannot pass without some act by the seller: though bringing the goods on to the land would suffice. As to sales of potential goods see para. 166.

¹ S. of G. Act. 5 (3).

² *Balding v. Reed*, (1865) 3 H. & C. p. 961.

³ *Lunn v. Thornton*, (1845) 1 C.B. 379 which Benj. 5th Ed. 130 doubts.

⁴ Section 87 Contract Act, *Congreve v. Everetts*, (1854) 10 Ex. 298, 23 L. J. Ex. 278; *Hope v. Hayley*, (1856) 25 L. J. Q. B. 155; *Allatt v. Carr*, (1858) 27 L.J. Ex. 385; *Chidell v. Gallworthy*, (1859) 6 C. B. N. S. 471.

⁵ Benj. 5th Ed. 128, 129; *Reeves v. Barlow*, (1884) 12 Q. B. D. 436 C. A.

⁶ See *Ex parte Hubbard*, (1886) 17 Q. B. D. p. 700; only if they were the builder's property, *Cumberland Union Bank v. Maryport*, (1892) 1 Ch. 415.

⁷ If the goods can be identified, see *Tailby v. Official Receiver*, (1888) 13 Ap. Ca. 523; *Brandt v. Dunlop*, (1905) A. C. 454.

CHAPTER VIII.

Sales of Unascertained Goods.

Where the goods are not ascertained at the time of making the contract of sale, it is necessary to the completion of the sale that the goods shall be ascertained.

Section 82.
Completion of sale, when goods are unascertained at date of contract.

Illustration.

A agrees to sell *B* 20 tons of oil in *A*'s cisterns. *A*'s cisterns contain more than 20 tons of oil. No portion of the oil has become the property of *B*.

The first essential for a contract of sale is that the goods must be specified. Specific goods are defined by the Sale of Goods Act¹ as "goods identified and agreed upon at the time a contract of sale is made."

§ 102.
Goods must be specific.

The rule that the parties must be agreed as to the specific goods on which the contract is to attach before there can be a sale, is founded on the nature of things.² Until the parties are agreed on the specific individual goods, the contract, if any, can only be to supply goods answering to a particular description, and as the seller could fulfil his contract by supplying any such goods, it is clear that there can be no intention to pass the property in any particular lot of goods, until the very goods are specified.

The same rule applies although the goods are so far ascertained that the parties have agreed that they shall be taken from some specified larger bulk. The reason for the rule is the same: the parties do not intend to transfer the property in one portion of the stock more than in another. And this is so though unaccepted delivery orders have been given for the portion sold³ and such

§ 163.
Goods out of larger bulk.

¹ Section 62.

² Blackburn, 3rd Ed. p. 182.

³ *Austen v. Craven*, (1812) 4 Taunt. 644; *Shepley v. Davis*, (1814) 5 Taunt. 617; *White v. Wilks*, (1814) 5 Taunt. 176 (Oil in

bulk): *Busk v. Davis*, (1814) 2 M. & S. 397 (ten tons of flax marked P. D. R. at Davis Wharf Ex. a certain vessel); *Boswell v. Kilborn*, (1862) 15 Moo. P. C. C. 809.

§ 163. order is given to the buyer.¹ For the fact that the seller has given an order to a wharfinger for the delivery of the goods out of a larger bulk to the buyers, does not prevent them from countermanding it before anything further is done if the buyer becomes insolvent, for the property has not passed.² If the buyer obtains delivery of more goods than the seller intended, no property passes therein.³

Delivery
order.

In *Campbell v. Mersey*,⁴ Erle C. J. said that it has been established by a long series of cases that the purchaser of an unascertained portion of a larger bulk acquires no property in any part until there has been a separation and an appropriation assented to by the vendor and vendee. But as Benjamin⁵ points out this does not necessarily mean a subsequent assent. The terms of the contract may bring the case under section 84 and if so the property passes on the determination of the seller's election. In *Gillett v. Hill*⁶ it was said that in such a case there is a power of selection in the vendor to deliver what he thinks fit ; and the right to the goods does not pass until the seller has made his selection.

Whitehouse
v. Frost.

One case is in apparent conflict with this principle of the law of sale. In *Whitehouse v. Frost*,⁷ which is scarcely ever mentioned without doubt or disapproval,⁸ Townsend bought of Frost 10 tons of oil in S's cisterns at buyer's risk ; there were 40 tons in the cisterns belonging

¹ *Brij Comaree v. Salamander*, (1905) 32 C. p. 825, but see *Busk v. Davis*, (1814) 2 M. & S. 397 explaining *Whitehouse v. Frost*, (1810), 12 East 614, but there the goods still had to be weighed.

² *Wallace v. Breeds*, (1811) 18 East. 522, 12 R. R. 423.

³ *R. v. Tideswell*, (1905) 2K. B. 273.

⁴ 14 C. B. N. S. 412, cited in *J. C. Shaw v. Bill*, (1884) 8 M. 88 o. c.

⁵ 4th Ed. p. 331, citing *Brown v. Hare*, (1858) 29 L. J. Ex 6.

⁶ *Gillett v. Hill*, (1884) 2 Cr. & Mee. 531 ; see too *Gabarron v. Kreeft* (1867) L. R. 10 Ex. 274 (all the ore in a mine, property to pass on payment).

⁷ (1810) 12 East. 614.

⁸ Benj. 4th Ed. 313 ; see 5th. Ed. 335, n. 8 where the case is said to be of no authority, though it has been followed in America.

to *D* and he had sold 10 tons of it to Frost, which were the 10 tons sold to Townsend. Frost gave Townsend a delivery order on *D* for these 10 tons. The order was accepted by *D*. Townsend left the oil with *D* and it was not severed from the bulk. It was held that the property passed as between Frost and Townsend. Lord Ellenborough thought Frost had assigned all the right he ever held. Grose J. said that the risk was the buyer's, and delivery was complete so far as the vendor was concerned, as the purchaser had to get the goods separated. Le Blanc J. put it on the ground that there remained nothing to be done between the parties. The purchaser accepted the only possession the seller ever had. In *Bush v. Davis*¹ the same Judges said that *Whitehouse v. Frost* was a sale of an "undivided quantity" and delivery had been made so far as the nature of things allowed. Blackburn considers that this explanation brings the case in line with the other authorities, but doubts if the facts as reported show any intention to sell specifically as an individual share. He suggests it may be a case of estoppel.

§ 163.

Undivided quantity.

Under this heading the case of *Mitchell v. Buldeo Dass*² seems to fall. There the buyers purchased the goods or any part thereof that may be in merchantable condition. The goods were to arrive in five specific bales. The Court in absence of any evidence of the condition of the goods held that no property passed, because under the contract the buyer must have an opportunity to examine the goods. On this point the case is similar to *Jenner v. Smith*.³ There two out of three specified pockets of hops lying in a certain warehouse were sold by sample, the seller set apart two for the purchaser and the warehouseman marked them for the vendee, but there was no alteration made in his books, and the vendor

¹ (1814) 2 M. & S. 397.

³ (1869) L. R. 4 C. P. 270.

² 15 C. 1.

§ 163. remained liable for the storage. The vendor sent the vendee an invoice. Held, no property passed because the vendee had not made the vendor his agent to appropriate the goods, nor abandoned his right to compare the goods with the sample or to verify the weights. There was neither previous authority nor subsequent assent to the appropriation.¹

§ 164.
Sale of
undivided
share.

If an undivided share is sold to be separated by the buyer from an ascertained bulk, it would seem the risk would pass to the buyer if the share remained unseparated through his default, though the property would not pass until separation.²

Where a seller despatched undivided goods to meet two contracts with different buyers, Lord Selbourne thought that the appropriation of goods to the aggregate of the two contracts passed the property to the buyers in undivided shares. The contract was F.O.B. and the House of Lords held that the buyer had an insurable interest.³ Benjamin⁴ doubts Lord Selbourne's view that the property had passed by the appropriation in an undivided portion of the goods to the respective purchasers. The other Judges were against this view.

§ 135.
Estoppel.

But though there can only be a sale of goods ascertained in a manner binding on both parties, for unless that be so, the agreement cannot be construed as a contract to pass the property in such goods, and if the goods are not ascertained or not in existence there can only be an agreement for sale,⁵ yet the seller may be estopped from alleging that the goods are unascertained. Where

¹ See Benjamin, 4th p. 339, 5th p. 348, where the case is doubted, as this conflicts with the rule that a buyer who has given the seller authority to select goods can subsequently reject them if not according to contract see §180. Blackburn seems to consider the case sound, 3rd Ed. p. 144.

² *Martineau v. Kitching*, L. R. 7 Q. B. p. 456; see however *White-*

house v. Frost, (1810) 12 East. 614.

³ *Stock v. Inglis*, (1882) 10 Ap. Ca. 263 p. 267.

⁴ 4th Ed. p. 340; 5th Ed. p. 356.

⁵ *Scath v. Moore*, (1886) 55 L.J. P. C. 54, 58; *Reid v. Macbeth*, (1904) A. C. 223; *Sir James Laing v. Barclay*, (1908) A. C. 35; *McEntire v. Crossley*, (1895) A. C. p. 463.

sellers consented to a transfer of unappropriated goods by the buyer, it was held that he could not set up a claim of lien against the transferee who had acted on the faith of his consent, nor could he allege that there were no goods appropriated to the contract.¹ § 105.

Nor is it essential that the seller should have acted under no misapprehension of the facts, for the Privy Council laid down that the law of this country gives no countenance to the doctrine that in order to create estoppel the person whose acts or declarations induced another to act in a particular way must have been under no mistake himself or must have acted with an intention to mislead or deceive.² Mistake no excuse.

So too an owner may be estopped from setting up that the property in his goods has not passed, if he attorns to a party who thereupon advances money on security of goods,³ or who purchases the goods relying on the owner's acknowledgment that he holds the goods to his seller's order.⁴ So a wharfinger who attorns to a second buyer, cannot afterwards set up the first buyer's title.⁵ So where two delivery orders were negligently given, the giver was estopped from denying that they held two consignments.⁶ Attornment.

In a Calcutta case it was held that after a party had finally elected to treat the transaction as a completed sale by which the property had passed he could not afterwards set up that the property had not passed.⁷

¹ *Ganges Manufacturing Co. v. Sourujmull*, (1880) 5 C. 669 A. C. 5 C.L.R. 583; *Anglo-India Jute Co. v. Omademull*, (1910) 38 C. 127 C. A.

² *Sarat Chunder Dey v. Gopal Chunder Laha*, (1892), 19 I. A. 203, 20 C. 296.

³ *Woodley v. Coventry*, (1863) 32 L.J. Ex. 185; *Knights v. Wiffen*, (1870) 40 L.J. Q. B. 51; *Stonard v. Dunkin*, (1810) 2 Camp. 344.

⁴ *Hawes v. Watson*, (1824) 2 B. & C. 540, *Anglo-India Jute Co. v. Omademull*, (1910) 38 C. 127 C. A.; see § 467.

⁵ *Gosling v. Birnie*, (1831) 7 Bing. 339; cf. *Holt v. Griffin*, (1833) 10 Bing. 246; *Gillett v. Hill*, (1834) 2 C. & M. 531.

⁶ *Coventry v. G. E. R.*, (1883) 52 L.J. Q. B. 694; 11 Q.B.D. 776.

⁷ *Buchanan v. Ardall*, (1875) 15 B. L. R. 276, 290 A. C.

§ 165.
Estoppel as to passing of property.

The question as to whether parties can after treating the property as having passed, afterwards set up that it has not has been discussed in some cases in England. The Privy Council held that where a buyer who had purchased a raft of wood which was greatly damaged in a storm, treated the remains as his, this could not be taken as an admission that the property had passed when the contract showed that it did not pass, as the raft had to be measured by the seller.¹ The suit was by the buyer to recover the price paid for the portions not delivered and damages for breach of contract : it was held he could succeed in both claims.²

§ 166.
Potential goods.

Before considering the subject of subsequent appropriation, it must be noted that there is a class of goods intermediate between ascertained and unascertained goods, such as future crops ; which are specific to the extent that the seller is excused from delivery if they perish before the time for delivery without his default.³ Section 87 deals with the appropriation of such future goods.

§ 167.
Ascertainment of unascertained goods.

If at the time of making the agreement for sale the goods are not specified or ascertained, goods may be appropriated or identified or specified as the goods on which the contract is to operate subsequently to the making of the contract, either by the assent of both parties or by the seller's determination of an election ; that is appropriation by the seller in pursuance of an authority given to him by contract ; and when they have been made specific, the presumption being that the property was intended to pass, the property will pass, unless there is something to show a contrary intention.

The Statutory rules are contained in sections 82, 83, 84, and 87 of the Contract Act.

¹ *Logan v. Le Mesurier*, (1847) 6 Moo. P. C. 116, 11 Jur. 1091.

² See *Boswell v. Kilborn*, 15 Moo. P. C. 309, 8 Jur. N. S. 443.

³ *Howell v. Coupland*, (1876) 1 Q.B.D. 258 C.A. ; *Taylor v. Caldwell*, (1863) 32 L.J. Q.B. 164.

Where the goods are not ascertained at the time of making the agreement for sale, but goods answering the description in the agreement are subsequently appropriated by one party, for the purpose of the agreement, and that appropriation is assented to by the other, the goods have been ascertained and the sale is complete.

Section. 83.
Ascertain-
ment of
goods by
subsequent
appropria-
tion.

Illustration.

A, having a quantity of sugar in bulk more than sufficient to fill 20 hogsheads, contracts to sell *B* 20 hogsheads of it. After the contract *A* fills 20 hogsheads with the sugar, and gives notice to *B* that the hogsheads are ready, and requires him to take them away. *B* says he will take them as soon as he can. By this appropriation by *A* and assent by *B*, the sugar becomes the property of *B*.

The corresponding English rules are that where there is a contract for the sale of unascertained or future¹ goods by description,² and goods of that description and in a deliverable state³ are unconditionally⁴ appropriated to the contract either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made.⁵ Where in pursuance of the contract the seller delivers the goods to the buyer or to a carrier or other bailee whether named by the buyer or not, for the purpose of transmission to the buyer and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

After an executory contract has been made, it may be converted into a complete bargain and sale by specifying

¹ Defined in S. of G. Act, s. 62 (1). ³ Defined in sec. 62 (4) S. of G. Act.

⁴ Sections 1 (2) and 19 (1) *ibid*.

² *i.e.* of a class or kind.

⁵ S. of G. Act, s. 18 rule 5.

§ 167 the goods to which the contract is to attach, or in legal phrase by the appropriation of specified goods to the contract.¹ The sole element deficient for a perfect sale is thus supplied. The contract has been made in two successive stages instead of being completed at one time.²

Both parties
must be
bound.

As has been already said unless both parties are pledged the one to give and the other to accept specific goods, no property can pass.³ This is obviously just, for until both parties are agreed the appropriation cannot be binding on either, not upon the one because he has not consented, nor upon the other because the first is free. The contract may be binding, but it has not fastened upon any particular thing. The selection of the goods by the one party, and the adoption of that act by the other, converts that which before was a mere agreement to sell into an actual sale and the property thereby passes.⁴

Appropriation when
revocable.

Where the goods being originally unascertained, one party appropriates some particular goods to the agreement, but the other has not subsequently assented thereto, such an appropriation is revocable by the party making it unless it is made in pursuance of an authority to make an election, conferred by the agreement,⁵ or unless before revocation it is adopted by the other party.⁶ In either of which two cases, it becomes final and irrevocably binding on both the parties.⁶

The question as to whether there has been a subsequent assent or adoption of the appropriation, is a question of fact : the question as to whether there has been a determination of an election is one of law.⁷

¹ *J. C. Shaw v. Bill*, (1854) 8 M. 38, quoting Benjamin.

² *Cf. Juggernaut Aggarwallah v. Smith*, (1906) 34 C. 173 A.C., citing *Rohde v. Thwaites*, (1827) 6 B. and C. 388.

³ See Blackburn, 3rd Ed. 137.

⁴ *Rohde v. Thwaites*, (1827) 6 A. and B. 388.

⁵ See *Guth v. Lees*, (1865) 3 H. & C. 558.

⁶ See *infra* under "Election."

⁷ Blackburn 128, 3rd Ed. p. 137. Chalmers, 5th Ed. p. 50.

The Code draws a distinction in section 83 between appropriated and ascertained.¹

§ 168.
Meaning of
appropriation.

The term used in English law equivalent to the expression "ascertained" in the Contract Act is "appropriated." But that term has various meanings which illustrate the several stages which under the English law may occur before the completion of a sale. "Appropriated" to the contract may mean²: (1) that the goods are so far appropriated that the seller would break his contract by delivering any other goods, though they remain his property, or it may be³ (2) that the goods are finally appropriated and the property has passed. The first class may be divided into cases where the word means:

(a) a selection on the part of the vendor when he has the right to choose the article.

(b) a mutual selection,

and yet in both cases the property may not have passed, for the appropriation may be conditional.

The simplest cases are these where there is no right of election, but a subsequent assent to the appropriation by the buyer is essential: the cases where the seller reserves a right of disposal will be considered separately.

Appropriation is a matter of intention, and appropriation by mistake has been held to be inoperative.⁴

§ 169.
Appropriation a matter of intention.

Appropriation may be conditional and the property will not pass unless the condition is fulfilled.⁵ In *Godts v. Rose*,⁶ where the contract was for 14 days credit, a wharfinger's acknowledgment that he held the goods for the buyer was sent to the buyer by the seller through a clerk who asked for a cheque, but the buyer, though he

§ 170.
Conditional

¹ *Angullia Co., v. Sassoon*, (1912) 39 C. (to be reported).

² *Per Parke B. in Waite v. Baker*, (1848) 2 Ex. 1.

³ See *Laidler v. Burlinson*, (1837) 2 M. & W. 602.

⁴ *Campbell v. The Mersey*

Docks, (1863) 14 C. B. N. S. 412; *cf. Harvey v. Harris*, (1873) 112 Mass. 32.

⁵ S. of G. Act, s. 19; Benj. 5th Ed. 375.

⁶ (1854) 17 C.B. 229.

§ 170. took the wharfinger's certificate, refused to give a cheque, claiming 14 days' credit, and subsequently obtained the goods ; it was held that the appropriation was conditional on a cheque being given and no property passed. The Court construed the contract as giving the seller the right to insist on payment before delivery.¹

In *Juggernath Augurwallah v. Smith*,² mate's receipts for goods were sent to the buyer together with a bill for the price, and there was a clause in the contract that if the receipts were retained for examination without payment, they should be deemed to be the seller's property until payment. The buyer, without paying for the goods, took the mate's receipts and used them to obtain bills of lading, which he pledged. The Appeal Court held that the appropriation was not conditional, and that the property had passed. If the contract had been that the goods should remain the seller's property until payment, the decision must have been that no property passed. For the passing of property is a matter of intention. The law laid down is sound enough, for the Court found as a fact that there was no intention to make the appropriation conditional : but probably the sellers were not a little surprised at such a finding : the whole contract seems a laborious attempt to make it impossible for the buyers to obtain the goods or documents of title without payment.³

Willis in his lectures on the Sale of Goods Act maintains that there can be no such thing as conditional appropriation ; either the party has appropriated the goods or he has not. This view is suggestive, but not altogether accurate. If the seller's selection of goods is clogged with a condition precedent, until that condition is fulfilled

¹ See also para. 197 as to the necessity for conditions imposed on appropriation being authorised by the contract.

² (1906) 33 C. 547 ; 34 C. 173 C.A.

³ The clause as to the goods remaining the seller's property was said to be to preserve his lien ; but such a lien cannot subsist apart from possession.

there is no appropriation in that sense of the word by which alone the property can pass; but there is what is technically known as appropriation. The learned author is really quarrelling with the slipshod phraseology which has obtained in judicial circles.

§ 170.

Pollock¹ observes that failure on the seller's part to satisfy the conditions for ascertaining or appropriating the goods, cannot be remedied in the buyer's favour by construction of law on the ground that the seller ought to have done what he did not.

§ 171.
Actual ap-
propriation
essential.

In *Gabarron v. Kreeft*² the purchasers agreed to buy all the ore from a certain mine to be shipped in their ships, payment to be made by acceptances to be given on a certificate that there was enough ore in stock to load vessels sent by the sellers for the goods, and the property to pass on acceptances being given for the price. The purchaser had paid for all the ore shipped and to be shipped in ships still unloaded. The seller had ore which he ought to have shipped in a ship sent by the purchasers. But no certificate had been given. He telegraphed that he would not load the ship on the buyer's account. He then loaded the ship and took bills of lading to the order of a fictitious person.³ The buyers sued for the goods. It was held that no goods had been appropriated and there being nothing to distinguish which goods had been paid for, payment of itself could not pass the property. The fact that the seller had committed a breach of contract by not appropriating the ore to the contract did not affect the point. However much it may be the duty of the seller to appropriate goods, until he does so no property passes.

An unsuccessful attempt by the seller to appropriate a cargo to the contract which has been rejected will not

§ 172.
Right to
make a
second
appropriation.

¹ 2nd Ed. p 368, citing *Gabarron v. Kreeft*, (1875) L.R. 10 Ex. 274, see § 155.

² (1867) 10 Ex. 274.

³ *i.e.* in effect to his own order.

§ 172. prevent him from appropriating another cargo and insisting on the buyer accepting it, if he can do so in accordance with the terms of the contract as to time or otherwise.¹

Second appropriation.

But such second tender must be within the contract time where time is essential.² The fact that on the first tender being refused, the seller made a second, does not prevent him on a suit for non-acceptance from relying on the first tender. In the case cited both tenders were rejected.³ But if the first tender is accepted and acted on, it cannot be withdrawn,⁴ and a second tender made. For a buyer by assenting to an irregular appropriation renders it irrevocable, and there is then a substituted contract for the goods accepted.⁵

§ 173.
Subsequent
assent of
buyer.

The buyer's subsequent assent is a matter of intention and assent by mistake would be inoperative,⁶ but a case of estoppel might arise.

In *Rohde v. Thwaites*⁷ the buyer purchased twenty hogsheads of sugar to be filled and delivered by the seller. The seller delivered four, and subsequently filled sixteen others, and wrote to the buyer to take them away, and the buyer promised to do so. It was held that this promise

¹ *Ashmore v. Cox*, (1898) 4 Com. Cas. 48; *Borrowman v. Free*, (1878) 4 Q. B. D. 500 C. A., cf. *Barber v. Taylor*, (1839) 5 M. & W. 527 (where second tender was too late). *America Bronze Co. v. Gillette*, (1891) 26 Amer. St. R. 286; see § 184. as to election; but there is no reason why, if there is no question of election, the seller should not tender a second time. It was said that after a ceremonial tender, the buyer had a right to expect no other, *Re Salomon*, (1899) 81 L.T. p. 330.

² See *Buldeo Doss v. Howe*, (1890) 6 C. 64 and cases in para. 172, *Reuter v. Sala*, (1879) 48 L.J. C.P. 492.

³ *Sanders v. McLean*, (1883) 52 L.J. Q.B. 481, 11 Q.B.D. 327;

cf. *M'Connell v. Murphy* (1873) L.R. 5 P.C. 203, where the second tender was bad, but independent of the first.

⁴ *Gath v. Lecs*, (1865) 3 H. & C. 558.

⁵ *Hall v. Pratt*, (1910) 2 K. B. 1003 not affected by the H. of L. on this point (1911) A.C. 394.

⁶ *Cambell v. Mersey Docks*, (1863) 14 C.B.N.S. 412; cf. *Harvey v. Harris*, (1873) 112 Mass. 32 cited in Benj. 5th Ed. 347. where both parties assented to the appropriation of packages containing wrong goods, held no property passed.

⁷ (1827) 6 B. & C. 388, 9 D. & R. 293; cf. *Alexander v. Gardner*, (1835) 1 Bing. N. C. 671; *Wilkins v. Bromhead*, (1844) 6. M. & G. 963, 13 L.J. C.P. 74.

was an implied subsequent assent and the property passed. § 173.

In *Elliott v. Pybus*¹ a machine was ordered to be made ; after completion the buyer admitted it was made according to order and paid £2 on account, and asked to have it sent to him before payment. This was held sufficient assent to the appropriation. So where on hearing that goods have been placed in his own sacks, the buyer requested them to be despatched, this was held to be assent to the appropriation.² When a buyer on hearing of the despatch of goods ordered, insured them, this was held a clear assent to the appropriation.³ Insuring goods Insuring. however was held by Lord Chelmsford to be at the utmost an uncertain indication of an intention to assume the risk.⁴ But in that case there was an appropriation if there was any at all of only a part of the goods ordered.

In *Jenner v. Smith*⁵ it was held there had been no subsequent assent. There the sale was by sample of two out of three pockets of hops lying in a particular warehouse which had not been inspected by the buyer. The seller selected two and the warehouseman marked them with the buyer's name, but the seller remained liable for storage. The seller sent the buyer an invoice stating the numbers and weights, and notified to him that the hops were lying at his disposal. It was held that no property passed as the buyer had not given his previous assent to the appropriation and had not waived his right to check the weights, or to compare the bulk with the samples.⁶

¹ (1834) 10 Bing. 512, 4 M. & Sc. 389.

² *Aldridge v. Johnson*, (1857) 26 L.J. Q. B. 296.

³ *Sparkes v. Marshall*, (1836) 2 Bing N. C. 761.

⁴ *Anderson v. Morice*, (1876) 1 App. Cas. p. 724 H. of L.

⁵ (1869) L.R. 4 C.P. 270.

⁶ Benjamin, 5th Ed. 348, doubts this reason, for it conflicts with the undoubted rule that even in the case of previous assent, the buyer has the right on delivery to compare the goods with the sample or to ascertain in any other way if they are of the contract quality.

§ 173. A Calcutta case is somewhat similar. The sale was of the goods, or any part thereof as might be in merchantable condition, contained in five specified bales to arrive. One was delivered and accepted; the rest rejected. It was held that as regards the rest no property passed, as the buyer had had no opportunity to examine the goods.¹ But if the buyer without inspection takes possession of the goods or exercises proprietary rights over them, he impliedly assents to the appropriation.²

Indian cases. The Indian cases closely follow the English rules, as the law is the same. Where unascertained goods were agreed to be sold to arrive, and were appropriated on arrival by the seller, as the buyer rejected them as improperly marked it was held no property passed.³

When goods bearing the contract mark were appropriated by the seller to the bargain, and were shipped at the request of the buyer, marked with his mark as required by the buyer's shipping instructions, it was held the property passed, although the goods had yet to be examined by the buyer.⁴

Such subsequent assent may be evinced by the buyer's conduct although he asserts that the quality is inferior, as when both parties submit the goods to arbitration to ascertain whether they are of the contract quality, and the buyer does not claim to reject them but only demands an allowance for inferiority.⁵

§ 174.
Goods to be
manufactured.

If goods are ordered to be manufactured, under the English law, the mere contract for making a chattel to order does not of itself vest in the person giving the order,

¹ *Mitchell v. Buldeo Doss*, 15 C. 1. but see previous note.

² *Clive Jute Mills v. Ebrahim Arab*, (1896) 24 C. 177. *Buchanan v. Avdall*, (1875) 15 B.L.R. 276, 283, 291.

³ *Yule v. Mahomed Hossain*, (1896) 24 C. 124 C.A., 1 C.W.N. 71.

⁴ *Juggernaut Agarwallah v. Smith*, (1906) 34 C. 173 C.A., citing *Rohde v. Thwaites*, see too *Clive Jute Mills v. Ebrahim Arab*, (1897) 24 C. 177.

⁵ *Finlay Muir v. Radhakissen*, (1909) 36 C. 786 O.C.

the property in the chattel when completed.¹ The reason was stated in *Muchlow v. Mangles*² to be that a tradesman often finishes goods which he is making in pursuance of an order given by one person, and sells them to another. If the first customer has other goods made for him within the stipulated time, he has no right to complain; he could not bring trover against the purchaser of goods so sold. § 174.

In *Bishop v. Crawshay*³ a bill had been accepted by the purchaser, yet it was held no property passed although the goods were made, for until the money paid was appropriated to the particular goods,⁴ he could not bring trover for them if sold to another.

There was a similar decision in the case of *Atkinson v. Bell*⁵; though as Benjamin⁶ points out the goods there were packed under the direction of the buyer's agent, and semble the decision was wrong.⁷

But once the appropriation is assented to the property passes⁸ although subsequent additions have been ordered to be made to the article after its completion according to the original contract.⁹ **Effect of assent.**

In India section 87 applies and apparently the seller can determine an election and pass the property thereby: but what the section means is none too clear.

In the period intervening between the making of the contract and the performance of any condition precedent a *bonâ fide* purchaser may acquire an interest in the chattel of which the first purchaser cannot deprive him.¹⁰ **Interest acquired before property passes.**

¹ *Wilkins v. Bromhead*, (1844) 13 L. J. C. P. 74; *Clive Jute Mills v. Ebrahim Arab*, (1897) 24 C. 177.

² (1809) 1 Taunt 318.

³ (1824) 3 B. & C., 418.

⁴ Cf. *Gabarron v. Kreeft*, (1875) L.R. 10 Ex. 274; *Bellamy v. Davey*, (1891) 3 Ch. 540.

⁵ (1828) 8 B. & C., 277.

⁶ 4th Ed. 348.

⁷ See *Elliott v. Pybus*, (1834) 10 Bing. 512.

⁸ *Elliott v. Pybus*, (1834) 10 Bing. 512; *Wilkins v. Bromhead*, (1844) 13 L. J. C. P. 74.

⁹ *Carruthers v. Payne*, (1828) 7 L. J. C. P. 84.

¹⁰ *Mires v. Solesby*, (1877) 2 Mod. 248; *Walker v. Clyde*, (1861) 10 C. B.N.S., 381 (organ to be paid for by instalments).

§ 175.
Appropriation of an entire cargo.

The same principle that the property *prima facie* does not pass till the chattel is manufactured and mutually appropriated on completion is also *prima facie* applicable in cases where a quantity of goods is contracted for as a whole, for example a cargo. Generally the property in the goods constituting a cargo will not pass until the full cargo is made up and appropriated on completion. So when a cargo of rice was purchased, payment against sellers' drafts with documents attached, the sellers being the charterers of the ship, and after part of the cargo was shipped it was destroyed, the House of Lords affirmed the ruling of the Appeal Court that the property did not pass until the full cargo was shipped, for the seller had to complete the loading so that the documents might be made out, which was a thing necessary to be done before the goods were in a deliverable state,¹ and that although the buyer had insured the whole cargo, he had no insurable interest in the part shipped. This case must be distinguished from the *Colonial Insurance Co. v. Adelaide Marine Insurance Co.*² where a cargo was purchased free on board. The buyer chartered the ship and insured the cargo of wheat "now on board or to be shipped." Part was shipped, and then the vessel was lost in a gale. The Privy Council held that the property had passed. In *Anderson v. Morice*¹ the vendors sold an undivided cargo to be sent in a ship chartered by them, the goods delivered on board remained in their possession and they retained the shipping documents until the completion of loading. In the other case the purchasers were the charterers, and the sellers had nothing to do with the shipping documents. The Court distinguishing *Anderson v. Morice*, held that delivery of the wheat on board from time to time was delivery to the purchasers and the property passed on such delivery.

¹ *Anderson v. Morice*, (1876) divided on the point).

¹ Ap. Ca. 713 (the house was

² (1886) 12 Ap. Ca. 128 P. C.

The second method of appropriating the goods is by the seller's determination of an election. Before considering the provisions of the Indian Contract Act as regards election, it will be convenient to set out the English rules which were good law when the Contract Act was passed, and remain so still in England. § 175.

The English rule on the subject of election is that when from the nature of an agreement one party¹ has to do some act to the goods, which from its nature cannot be done until the goods are appropriated, he has authority to select goods in order that he may be able to do that act, and when once he has commenced that act, the appropriation has been irrevocably determined, but till then he may change his mind.² It follows from this that where from the terms of an executory agreement, the seller is to despatch the goods,³ or to do anything to them that cannot be done till the goods are appropriated, he has the right to choose what the goods shall be⁴; and the property is transferred the moment the despatch or other act is commenced, for then the appropriation is made conclusively by the authority conferred by the agreement, and in Lord Coke's language the certainty and thereby the property begins by election⁵; but however clearly the seller may have expressed an intention to choose particular goods, and however expensive may have been his preparations for performing the agreement with these particular goods, yet until the act has actually commenced the appropriation is not final, for it is not § 176.
Election.

English Rule.

¹ The case of a buyer having the right of election is rare, and there is no reported case on the point. H. L. 119.

³ *Ex. p. Pearson*, (1868) 37 L.J. Ch. 554, L.R. 3 Ch. Ap. 443.

⁴ The goods selected must answer to the contract, if they do not, no property passes; see para. 181.

² Benj. 5th p. 342 *Heyward's Case* (1595) 2 Co. Rep. 37a., 2 Coke 36; Chalmer's 1st Ed. p. 43; Blackburn 2nd Ed. p. 180; cf. *Rankin v. Potter*, (1873) L. R. 6

⁵ *Heyward's case*, 2 Coke 36.

§ 176. made with the authority of the other party nor binding upon him.¹

This proposition is illustrated by Blackburn by two cases on the border line. In the first, goods were ordered from the manufacturers to be despatched in a ship by them on being insured. The goods were packed and marked for the buyer, insured and sent to the seller's shipping agent; while being put on board by him they were injured. It was held that the property had passed.² The same Judges who had decided *Fragano v. Long*,³ held in *Atkinson v. Bell*⁴ that where machines were ordered to be made after the pattern most approved of by a person called Kaye and were made and altered to suit some alteration in Kaye's machines, and were then packed for despatch under the supervision of the buyer's agent and the buyer was informed that they were ready and was asked by letter how they should be sent, but did not reply, no property had passed.

Blackburn⁵ observes that there can be no doubt that the seller in *Atkinson v. Bell* had as far as intention could do it appropriated the goods to the contract; but he had done nothing under his contract: he had only made great preparations for doing something; he could still have supplied any other machines answering the description; but if the buyer had assented to the appropriation the case would have been different. Benjamin⁶ says that this case is about as near an approximation to a determination of election without actually becoming so as can well be conceived. It can only be distinguished from *Fragano v. Long*, on the ground that there the order was to despatch the goods on the buyer's account, and that⁷ when the goods were being despatched, it was

¹ Blackburn 3rd Ed. p. 188,
cited in *Aldridge v. Johnson*, 26
L. J. Q. B. 296.

² *Fragano v. Long*, (1825) 4

B. and C. 219.

³ (1828) 8 B. and C. 277.

⁴ 3rd Ed. p. 189.

⁵ 5th Ed. p. 360.

really the act of the buyer through his agent the seller, and this constituted an implied assent to the appropriation made by the seller which then became no longer revocable. This element was wanting in *Atkinson v. Bell*. But it would seem having regard to *Rhode v. Thwaites*,¹ that this case was not rightly decided, for it appears that the machines were altered to suit the buyer's agent and packed under his direction; and the rule at Common Law is that where the seller is to manufacture goods for the buyer, *primâ facie* the property will pass when the goods are completely made and are appropriated with mutual assent.² § 176.

It is quite clear that under the English Law the mere selection or setting aside of goods cannot change the property.³ The reason is that such action may be merely for the convenience of the party without any final determination to employ the goods for the fulfilment of his contract. So far the rule is consonant with sense. Reason for English Rule.

But the distinction drawn between a mere intention to appropriate and a determination of an election especially when the rule goes so far that it has been held⁴ that however clearly the seller may have expressed an intention to choose particular goods, and however expensive may have been his preparations for performing the contract with particular goods, there is no final appropriation, is not so clearly reasonable.

The reason given by Blackburn⁵ for disregarding mere intention, is that the appropriation is not made with the authority of the other party nor binding on him. He admits however that the agreement gives the seller a right to choose the goods. And there seems no logical reason why the exercise of that authorised choice

¹ (1827) 6 B. and C. 388.

² See para. 174.

³ *Dixon v. London Small Arms Factory*, (1876) 1 A. C. 632. 653.

⁴ *Aldridge v. Johnson*, (1857)

26 L. J. Q. B. 296.

⁵ Blackburn 128; 2nd Ed. 130.

§ 176. should be any less effectual than the doing of any act to the goods when chosen.

The Sale of Goods Act has not interfered with the Common Law in this respect and only provides that the assent of the buyer to an appropriation may be express or implied, and may be given before or after the appropriation is made.¹

§ 177.
Indian Rule

But the Contract Act has three sections relating to the point, 83, 84, and 87. Now section 83 provides that if the buyer of the goods are subsequently appropriated, and the other party assents, the goods are ascertained and the sale is complete. Had the section stood alone it would obviously have been construed to mean the same as section 18 rule 5 (1) of the Sale of Goods Act. But section 84 provides.

Section 84.
Ascertainment of
goods by
seller's
selection.

Where the goods are not ascertained at the time of making the contract of sale, and by the terms of the contract the seller is to do an act with reference to the goods which cannot be done until they are appropriated to the buyer, the seller has a right to select any goods answering to the contract, and by his doing so the goods are ascertained.

Illustration.

B agrees with *A* to purchase of him at a stated price, to be paid on a fixed day 50 maunds of rice out of a larger quantity in *A*'s granary. It is agreed that *B* shall send sacks for the rice, and that *A* shall put the rice into them. *B* does so and *A* puts 50 maunds of rice into the sacks. The goods have been ascertained.

Apparently the selection of the goods and not the "act" is the crucial point. Section 87² refers to future goods and is vague, save that the seller may by acts transfer the property in the goods, and though inelegant would not by itself be construed as altering the Common

¹ Sec. 18 rule 5 (1).

cases coming within s. 87.

² See *ante* para. 174 for English

Law rule¹: but section 84 is clearly contrary to the Common Law although the illustration seems to show that the Legislature meant to follow it. § 177.

The Indian decisions on the point are not very clear.² Indian cases. The view taken by Sir Fredrick Pollock³ is that section 84 is subordinate to the principle laid down in section 83, and that it is intended to declare existing law, but that it is doubtful whether the English authorities warrant the statement in this positive and unqualified form. The section however would have followed the Common Law if the determining point had been the act and not the mere selection. Doubtless the English rule is more convenient for deciding cases, but it seems clear that the Indian Legislature deliberately altered a well-known rule and intended to avoid the obvious hardship of cases such as *Atkinson v. Belt*. The mere fact that section 84 was superadded to section 83 shows an intention to alter the Common Law.

Selection however to be effective must be final and irrevocable: and the result of the Indian rule is that the question is one of fact and not of law. The courts must decide when the seller has irrevocably selected, and generally speaking the English rule requiring an overt act will be the test applied and will only be disregarded when the seller has otherwise obviously made a *bonâ fide* selection to fulfil his contract. § 178. What amounts to election.

It is to be noticed that the principles of sections 80 and 81 apply in cases where the seller has an election. Thus⁴ where an unascertained cargo was sold to be Where the price has to be ascertained.

¹ But see *Maradugula v. Kotala*, (1911) 21 M. L. J. 413, where the appropriation of trees to be cut and despatched by one party was held to be made on such despatch without any further assent by the other party.

² See para. 191.

³ 2nd Ed. p. 368.

⁴ *Anderson v. Morice*, (1875) L.R. 10 C.P. 609 I.A.C. the dissenting Judges construed the contract as intended to pass the property as each sack was loaded into the ship.

§ 178.
Where
price to be
ascertained.

shipped in a particular ship, the price to be fixed by weighing and to be payable against the shipping documents, and on notice of the ship's arrival to be loaded, the buyers on the suggestion of the sellers insured the goods, but not the expected profit, and after part was shipped, it was destroyed, whereupon in order to charge the underwriters the sellers made out a bill of lading for the lost goods which the buyers took and gave acceptances for, it was held that it was a contract for an entire cargo, and though as the price depended on weighing by the seller and buyer that showed a *prima facie* intention that no property should pass until the price was ascertained, still the contract showed that the intention was that the property should pass before that time,¹ but that as the sellers had to complete the loading so that the documents might be made out, which was a thing necessary to be done before the goods were in a deliverable state,² no property had passed in the part loaded : and that after loss the buyer could exercise his option to accept a portion only but not so as to charge the underwriters.³

Where
goods to be
made
deliverable.

Selection of
a portion of
a larger bulk.

If the seller having an election selects an unascertained portion out of a larger bulk the purchaser acquires no property in any part until there has been a separation of the correct quantity by the seller.⁴ As Benjamin⁵ rightly points out the assent of the buyer to the appropriation is in cases, where the seller has an election, prior thereto, but that does not make a selection of an unascertained portion of a larger bulk an election ; there must be a separation and appropriation by the seller, otherwise no property passes, for the

¹ As under s. 60.

² See § 81.

³ See § 154.

⁴ *Campbell v. The Mersey Docks*,
(1863) 14 C.B.N S. 412.

⁵ 5th Ed. 346. But see *per*
Lord Selbourne in *Stock v. Inglis*,
(1863) 10 A. C. 263 ; but see post
p. 207.

goods are not ascertained ; a case of estoppel may however arise.

It does not appear from the terms of sections 84 and 87 that for the property to pass the seller need give notice of the determination of an election.¹ Neither Benjamin² nor Blackburn³ consider it to be necessary. From the nature of the case none is necessary, for the buyer has given the seller authority to appropriate goods. In the case of other elections⁴ Bramwell, L. J.⁵ said I know of no rule which compels a person having an option to give notice which way he exercises it, where the position of the other party would not be affected by the giving or withholding of notice, where his conduct would not be regulated thereby.

§ 179.
No need to give notice of election.

If there is an unfulfilled condition precedent no property passes,⁶ even though the goods have been delivered into the actual possession of the buyer,⁷ and this applies to the case of specific goods.⁸

Unfulfilled condition.

Primâ facie no property passes by any act purporting to be a determination of an election unless such election is

§ 180.
Election must conform with the contract.

¹ Other elections seem to depend on notice, *Scarf v. Jardine*, (1881) 7 A.C. p. 361, but see *Rankin v. Potter*, (1873) L.R. 6 H.L. p. 186.

² 5th Ed. p. 843.

³ 128, approved in *Aldridge v. Johnson*, (1857) 26 L.J.Q.B. 296.

⁴ See as to the necessity of giving notice of shipment where contract is void if the ship is lost, *Nasservanji v. Khambatta*, (1888) 18 B. 15 disapproved in *Dadabhai v. Khambatta* (1897) 22 B. p. 196, and see *Ashmore v. Cox*, (1898) 4 Com. Cas. 48, where a somewhat similar clause as to loss or non-arrival for other unavoidable

cause, was held only to apply to goods shipped "and I think declared." But see *Rankin v. Potter*, (1873) L.R. 6 H.L. p. 136, set out *infra*.

⁵ *Rankin v. Potter*, (1873) L.R. 6. H.L. p. 136 (election to abandon to underwriters).

⁶ Blackburn 2nd Ed. 235 Beng 5th Ed. 566, *Ullock v. Reddelein*, (1828) 5. L. J. O. S. K. B. 208 (particular mode of transmission).

⁷ *G I.P. v. Hammandas*, (1889) 14 B. 57; S. of G. Act S. 19 (1).

⁸ *Bishop v. Shillito*, (1819) 2 B. & A. 329 (n); *Loeschman v. Williams*, (1815) 4 Camp. 181.

§ 180. made in strict¹ accordance with the contract. If the goods selected are not according to the contract no property passes, for there has not been performance of the contract.² The seller's duty is to give the buyer the property and possession, actual or constructive, of the correct quantity of goods corresponding to the description in the contract, specified and identified.³ He cannot by election or otherwise appropriate another person's goods to the contract.⁴

Another's
goods.

§ 181.
Option to ac-
cept goods
not in con-
formity.

It has been held that if the election is not in conformity with the contract it is no election at all,⁵ and this is certainly so if the buyer rejects it.⁵ But if the seller makes a tender the buyer has his option to accept goods although they do not conform to the contract, but until he has exercised that right no property passes,⁶ and he has not in the meantime an insurable interest in the goods.⁶ On this last point there seems to have been no difference of opinion in *Anderson v. Morice*⁶; the judges who held that there was no insurable interest did so on the ground that until the cargo was complete there was no election at all. *Sparkes v. Marshall*⁷ was distinguished because there, although the seller had shipped a wrong quantity of goods to a wrong port, the buyer had assented to the appropriation in ignorance of its defects, and had therefore

¹ The contract may make an election as to each item binding; see s. 182.

² *Vigers v. Sanderson*, (1901) 1 K.B. 608, Benj. 5th Ed. 356; *Cunliffe v. Harrison*, (1851) 6 Ex. 903; *Hart v. Mills*, (1849) 15 M. & W. 85; *Dixon v. Fletcher*, (1837) 3 M. & W. 145.

³ *J. C. Shaw v. Bill*, (1886) 8 M. 38; cf. *Fragano v. Long*, (1825) 4 B. & C. 219; *Alexander v. Gardner*, (1835), 1 Bing. N.C. 671; as to quantity see s.s. 119, 182.

⁴ *Cumberland v. Maryport*,

(1892), 1 Ch. 415.

⁵ *Borrowman v. Free*, (1879), 48 L.J.Q.B. 65 C. A.; but see per Beamwell B. *Langton v. Higgins*, (1859) 28 L. J. C. P. 252 "if the buyer had a right to object to the quality that at the utmost would only be an option in him, and would not prevent the property from passing."

⁶ *Anderson v. Morice*, (1876) 1 Ap. Ca. p. 780; *Wallis v. Pratt* (1910) 2 K.B. 1003 C.A. overruled on other points; (1911), A.C. 394.

⁷ 2 Bing. N.C. 761.

an option to reject the goods when he discovered the defects, but the loss occurred before he exercised his option. It was decided that although the buyer might have the option to accept a short cargo if tendered, still unless as each sack was put on board the seller was bound to tender it, as having elected, the buyer could after loss elect to accept it, but not so as to charge the underwriters.

As has been observed *primâ facie* the election must not only be of the right goods, but of the right quantity, otherwise the buyer need not accept them.¹ But the contract may be so framed as to show an intention that the property in each separate item shall on the due determination of an election in its respect, pass to the buyer.² And if after due exercise of the right of election as to part the seller is excused further performance, as for example by supervening impossibility, the property passes to the buyer.³ But the converse proposition that if after loading part of a cargo it was destroyed, the seller could put in goods enough to complete the cargo allowing for the part destroyed and claim that it was a proper election was held to be unsound.⁴

§ 182.
Election as
to part.

The buyer also has the option to accept an election as to part if tendered where the seller refuses or fails to deliver the rest : but when the property vests in such a case is not clear. In *Anderson v. Morice*,⁴ Lord Hatherly held that until the buyer exercised his option no property would pass.⁵ Lord O'Hagan considered that there might be an

Where part
tendered.

¹ But see for the case of instalment contracts § 538.

² *Anderson v. Morice*, (1875) L.R. 10 C.P. 609, 617, 1 Ap. Ca. 713 H.L.; *The Colonial Ins. Co. v. The Adelaide Marine Ins. Co.* (1886) 12 Ap. Ca. 128 P.C.; *Aldridge v. Johnson*, (1857) 26 L. J. Q. B. 296; *Langton v. Higgins* (1859), 28 L. J. Ex. 252; cf. *Bryans v. Nix* (1839), 4 M. & W. 775, where semble each cargo was intended to be complete.

³ *Rugg v. Minett*, (1809), 11 East, 210.

⁴ *Anderson v. Morice*, (1875), 1 A. C. p. 726, 783.

⁵ But it has been held that after an election as to a part of the goods, the seller cannot divest the property which is in the buyer, but the cases related to filling the buyer's sacks, *Aldridge v. Johnson*, (1857) 26 L. J. Q. B. p. 300 and bottles *Langton v. Higgins* (1859) 28 L.J.C.P. 252.

anticipatory exercise of the option,¹ and this view is in accord with all the cases on the point.²

It seems such option can be exercised as to goods not in accordance with the contract,³ but semble there can hardly be an anticipatory exercise of the option in such cases.⁴

But the buyer may by assenting to what he thought was an exercise of an election vest the property in himself although on discovering the defects in the appropriation he may reject it.⁴

**§ 183.
Must be
intentional.**

The determination of an election must be intentional, and if the only evidence of appropriation is a mistake of the seller's servant, no property passes.⁵

**§ 184.
Election
once made
is final.**

An election to appropriate once made is final and irrevocable.⁶ The property having passed thereby, nothing the seller can do will divest it.⁷ It is binding on both parties.⁷ Benjamin⁸ however states that in certain cases it can be revoked, but the authorities cited by him do not support him. He suggests the qualification that it is revocable if the other party has not in reliance thereon altered his position. But there is no case which supports this with respect to an election to appropriate goods. *Gath v Lees*,⁹ where the election was to deliver in August or September and the seller gave notice for an August delivery,

**Suggested
qualification.**

¹ Relying on the cases cited on last page in note ².

² See cases on note ² previous page.

³ See *Wallis v. Pratt*, (1910) 2 K.B. 1003, not affected by the judgment on the H.L. on this point (1911) A.C. 394; *Anderson v. Morice*, (1876), 1 Ap. Ca. p. 730; See §§ 171, 151.

⁴ *Sparkes v. Marshall*, 2 Bing. N.C. 761 approved in *Anderson v. Morice* (1875) L.R. 10 C.P. 618, 1 A.C. 713.

⁵ *Campbell v. The Mersey Docks*, (1863), 14 C.B.N.S. 412; *Thornton v. Simpson*, (1816) 6 Taunt. 556; see § 169, but quære is not the seller estopped from setting up his servant's mistake.

⁶ *Blackburn* 3rd Ed. 138, citing *Heywood's case* 2 Coke. 36.

⁷ *Aldridge v. Johnson*, (1857) 26 L.J. Q.B. p. 300 and see as to election as to part para. 182.

⁸ 5th Ed. 357, citing *Gath v. Lees* and *Barrowman v. Free*.

⁹ (1865) 3 H. & C. 558.

supports the qualification, but that was not an election to appropriate goods. That case however was explained ¹ in *Borrowman v. Free* ² as if it supported the qualification in respect to such an election, but the opinion of Bramwell L. J., was that the passage in *Blackburn* ³ was correct. The facts in *Borrowman v. Free* ² were that the seller tendered bills of lading for a cargo which were rejected by the buyer : on reference to arbitration the objection was upheld. The seller then within the time allowed by the contract tendered bills of lading for a second cargo which was in accordance with the contract. It was held that it was a good tender. Bramwell, L. J., said the sellers if they had made an election at all by the first tender made one which they had no right to make and withdraw it with the sanction of the buyers. Brett, L. J., said the doctrine of election did not arise, as there was no appropriation in the case of the first tender, because it was not in accordance with the contract.⁴

In *Reuter v. Sala* ⁵ the sellers having an option to deliver 25 tons of goods by ship or ships, to be declared, declared for one shipment. The shipment included five tons not according to contract : and the sellers sought to amend it by substituting another five tons which were also not in accord with the contract. They then contended that the buyers should accept the 20 tons. It was held that as they had elected to ship by one vessel and declared their election to the buyers, still more when they followed up their election by tendering the whole, they could not turn round and call on the buyers to accept part thereof, as they might have done but for the election. It

¹ *Per* Brett L. J. who however held that no question of election arose in the case.

² (1879) 48 L. J. Q. B. 65 C. A. so held also in *Tetley v Shand*. (1872) 25 L. T. 658. C. A. where the Court would not hear the

point argued.

³ *Blackburn* 8rd Ed. 138, citing *Heywood's case* 2 Coke 86.

⁴ *Ibid.* p.67 and *per* Cotton L.J. p. 70.

⁵ (1879) 48 L. J. Q. B. 492 C. A.

§ 184.

was also said that if, after the declaration and tender, the sellers had on finding out the mistake, after it was apparent that they could not deliver the whole, separated the good from the bad and made a fresh tender of the former for acceptance, the buyers could have rejected. This seems difficult to reconcile with *Borrowman v. Free*, where the seller not only tendered but fought the question of the correctness of his tender before an arbitrator. Benjamin¹ says that in *Reuter v. Sala* the amended tender was bad because out of time, and the sellers might have substituted a fresh declaration of twenty-five tons if they could have in time or even of an instalment if made when there was nothing to show that he could not deliver the full quantity,² and that the judgments show this. But the reasons given in the case for saying the election was binding conflict with the decision in *Borrowman v. Free*.

In an earlier similar case when sellers by mistake declared for the wrong ships and amended the declaration within the contract time, it was held that the buyers were bound to accept the second correct declaration as they were not prejudiced and had taken no steps on the first notice.³ In a similar case of a declaration, Russell, C. J.,⁴ said the sellers were not estopped if they made a declaration which was properly objected to as not answering to the contract from making a fresh one provided it was in time, because the buyer had not treated the first declaration as an absolute breach and repudiation of the contract. But this reason conflicts with *Borrowman v. Free*.

¹ 5th Ed. p. 720.

² A distinction made in *Brandt v. Lawrence*, (1876) 1. Q.B.D. 344, but there seems no reason for differentiating in instalments contracts between the buyer's duty to accept an instalment when it is clear the seller cannot make up the full amount in the future, and

when he has already made a defective delivery, unless the contract makes delivery of the entire quantity a condition.

³ *Thornton v. Simpfon*, (1816) 6 Taunton 556 C. A. approved in *Borrowman v. Free*.

⁴ *Ashmore v. Cox*, (1898) 4 Com Cas. p. 52.

Whether the qualification is sound in the case of other elections is not clear. Blackburn, L.J., consistently stated the rule that an election once made is final,¹ and said that was a general principle of law.¹ Bramwell, L.J., however supports the qualification.² The view taken in India by Jenkins, C. J., was that section 115 of the Evidence Act, *i.e.* estoppel, applied to an election under a will.³ § 184.

The rule seems to be that as regards the right of election generally the principle of estoppel applies,³ but in the case of an election to appropriate, the property having passed, the seller cannot divest it; but if the buyer rejects the appropriation, the seller can make a second as in *Borrowman v. Free*, and if the buyer objects to an appropriation on a particular ground, the fact that the seller meets the objection, does not preclude him on the amended tender being rejected from relying on both his tenders.⁴ The reason seems to be that where by an election the property passes nothing that the seller can do will divest the property,⁵ but an election being ineffective Rule.

¹ *Calcutta Co. v. DeMattos*, (1863) 32 L. J. Q.B. p. 328 (election by tender of shipping documents); *Ward v. Day*, (1864) 33 L. J. Q. B. p. 12 (election to forfeit a lease); *Rankin v. Potter*, (1878) L. R. 6 H.L. pp. 119,120 (election to abandon to underwriters); see also *per Benjamin* arguing p. 89; *Scarf v. Jardine*, (1882) 7 A.C. p. 360 (election to treat new firm as liable in preference to the old one) cf. *Morel v. Westmorland*, (1904) A.C. 11 H. of L.; *Brown v. Royal Ins. Co.*, (1859) (election by insurers to reinstate).

² *Borrowman v. Free*, *supra*; *Scarf v. Jardine*, (1882) 7 A. C. p. 364; cf. *Rugg v. Weir*, (1864) 16 C. B. N. S. L. 477 (cash with option of bill).

³ *Ad. Gen. v. Karmull*, (1903) 29 B. 133,143. Russell J. however treated estoppel and election as two separate things, but see *Abdul v. Hasambhoy*, (1892) 16 B. p. 160, when the rule is cited without qualification but citing *Gath v. Lees* as an authority.

⁴ *Sanders v. Maclean*, (1888) 52 L.J. Q. B. 481 (tender of two of three bills of lading).

⁵ Expressly held in *Aldridge v. Johnson*, (1857) 26 L.J. Q.B. p. 300, where the seller after filling the buyer's sacks as arranged emptied them out again. The case was approved in the H. of L. in *Anderson v. Morice*, (1875) 11 A.C. 713 and by the P. C. in the *Colonial Ins. Co. v. The Adelaide Ins. Co.*, (1886) 12 A. C. 128.

§ 184. unless it conforms to the contract,¹ an improper tender thereunder only bars a fresh tender if the seller is estopped by having led the buyer to alter his position. If a tender is made after a properly exercised election and rejected, the seller has his option to sue for non-acceptance or to accept the rejection and tender again, in which case the buyer could not turn round and set up that the election previously made was binding²: generally the seller cannot in such case rely on the first tender, for he has elected to treat it as ineffective unless as in *Sanders v. Maclean*,³ without abandoning the first tender he merely tries to meet the buyer's objections thereto. In other elections, the exercise of the option effects nothing and can be withdrawn unless the other party is thereby prejudiced so as to raise an estoppel.

§ 185.
Election
where no
carrier
intervenes.

Instances of election will now be examined. The simplest cases are those in which no carrier intervenes and they will be considered first. In some cases the vendor is given by the contract the sole right to appropriate goods to the bargain, that is by the agreement itself the parties confer the right of selection on the vendor, and the vendee's assent to such appropriation is prior to it, and no subsequent assent is necessary⁴ although he can afterwards reject the goods if they are not according to the contract,⁵ for in such a case there has been a non-compliance with the contract. In *Aldridge v. Johnson*,⁶ there was an exchange of 100 quarters of oats forming part of a bulk 200—300 qrs.

¹ Or is accepted by the buyer, see para. 181.

² See *Borrowman v. Free*, (1879) 48 L.J.Q.B. 65 C.A., where the Court clearly considered the first tender good.

³ *Sanders v. Maclean*, (1883) 52 L. J. Q B 491, tender of two of three bills of lading.

⁴ *Aldridge v. Johnson*, (1857) 26 L.J. Q.B. 296.

⁵ *Chanter v. Hopkins*, (1838) 4 M. & W. 399; *Bowes v. Shand*, (1877) 2 Ap. Ca. p. 470; cf. *Vigers v. Sanderson*, (1901) 1.K.B. 608, 6 Com. Cas. 99.

⁶ (1857) 26 L.J.Q.B. 296 7 E. & Bl. 885.

which the plaintiff had seen and approved. The plaintiff was to send sacks for the oats which the seller was to fill up and despatch free of charge. The plaintiff sent 200 sacks for the oats, of which 155 were filled by the owner's order but were subsequently emptied out again into the bulk. But the Court held the property in the oats placed in the sacks had passed to the plaintiff. Erle, J., said the decisive act was putting the portion into the sacks. There was enough in the bulk to fill the remaining 45 sacks, but it was held no property passed save in the oats placed in the sacks. The fact that the oats were emptied out again was immaterial as the election once made was irrevocable.¹

§ 185.

In *Jenner v. Smith*² where the sale was by sample of two pockets of hops out of three specified lots, the vendor had two set aside by the warehouseman and ticketed with the vendee's name, but no alteration was made in the warehouseman's books and the vendor remained liable for the storage. The vendor sent the vendee an invoice with the numbers and weights with a note, "the two pockets are lying at your order." The buyer did nothing. Held that the property did not pass because the vendee had not made the vendor his agent to appropriate nor abandoned his right to compare the bulk with the sample.

When the goods are delivered to a carrier by land or sea, he is presumed to be the buyer's agent to assent to the appropriation,³ subject of course to any just ground for rejection. When the contract provided that the property in goods should pass on shipment, it was held that this could only apply to goods within the meaning of the

§ 186.

Delivery to a carrier.

Carrier agent to receive not to accept.

¹ Followed in *Langton v. Higgins*, (1857) 28 L. J. Ex. 252 (bottles filled up); cf. *Rugg v. Minett*, (1809) 11 East. 210.

² (1869) L.R. 4 C.P. 270.

³ *Hanson v. Armitage*, (1822) 5 B. & A. 557; *Acebal v. Levy*, (1834) 10 Bing. 376; *Coombs v. Bristol* (1858), 27 L. J. Ex. 401 *Cusack v. Robinson* (1861) 30 L.J.Q.B. 261; *Coats v. Chaplin*, (1842) 3 Q.B. 483.

§ 186

contract. The captain is in such a case only the agent to receive goods not to accept them.¹ The rule is as stated in section 18 rule 5 (2) Sale of Act quoted above.²

It is immaterial whether the carrier is named by the, buyer or not.³

§ 187.
Mere ship-
ment not
enough.

But the act of shipment is not complete until the bill of lading is given; and if the goods shipped are the shipper's property it remains uncertain on whose account the goods are shipped, until a bill of lading is obtained making the goods deliverable to the seller or the buyer. And this is so though the ship is the buyer's ship or chartered by him,⁴ and sent for the goods. For mere shipment is not an appropriation conditional or otherwise unless it is done with the intention of appropriating.⁵

As Blackburn, J.,⁶ put it in the case of shipment of unascertained goods "the handing over of the policy of insurance and bill of lading to the buyer is *prima facie* an indication of an intention to pass the property," for the goods are then in the control of the buyer and irrevocably appropriated to the contract by the seller.

§ 188.
Shipment
where no
right of
control is
reserved.

The cases where the seller has not, although appropriating the goods by shipment expressly or by implication reserved control over them, will be first examined.⁷

In *Fragano v. Long*,⁸ goods were ordered to be despatched on insurance being effected, terms 3 months credit from date of arrival. The goods were sent marked with the seller's name to agents of the vendors to ship. Insurance was effected in the buyer's name. The suit

¹ *Vigers v. Sanderson*, (1901) I. K. B. 608.

² See Contract Act s. 91.

³ Blackburn 3rd Ed. 152; Contract Act s. 91; *Dutton v. Solomonson*, (1803) 3 B. & P. 582; *Biddell v. Clemens*, (1911) I.K.B. p. 956.

⁴ *Gabaron v. Kreeft*, (1873) L.R. 10 Ex. 274.

⁵ *Brandt v. Boulby*, (1881) 2 B. & Ad. 932, Blackburn 3rd Ed. 159; see para. 199 as to effect of taking a bill of lading.

⁶ *Calcutta Co. v. De Mattos*, (1868) 82 L. J. Q. B. 322; 33 L. J. Q. B. 214.

⁷ The contract may be to deliver at the destination, see § 158

⁸ (1825) 4 B. & C. 219.

was by the buyer against the carriers for negligence. It was contended that the property had not passed as the vessel's receipt was in the name of the seller's agent and he was therefore entitled to the bill of lading. It was held that the property passed on the goods leaving the seller's warehouse. The seller in despatching was acting as the buyer's agent, but Bayley, J., said that the receipts might have raised a difficulty if the seller and his shipping agents had been setting up an adverse interest, but not in the present case. Holroyd, J., said when goods are to be delivered at a long distance from the vendor, and no charge is made by him for carriage, they become the property of the buyer as soon as they are sent off.¹ This suggests that if the vendor pays the charges, it is presumed that he retains the property. This point was discussed in the House of Lords in *Dunlop v. Lambert*.²

§ 180.

In *Key v. Cotesworth*³ the plaintiff, on the guarantee of the defendants that they would be liable up to £1,500 for orders given by X, the bills of lading to the defendant's order to be forwarded to the defendant with bills of exchange, shipped goods, bill of lading in name of defendants and the invoice stating goods on account and risk of X. The defendants received the documents on the 29th of August. Some of the goods arrived on the 21st October. On the 27th X failed. The defendants took possession and sold the goods. They did not however accept the bills. The plaintiffs sued for proceeds of the goods as money received to the use of the plaintiff. It was held to be an unconditional sale, and the plaintiff could not recover, the property being in X.

¹ Provided of course that they are unconditionally appropriated to the contract.

² 6 Cl. & Fin. 600. Benj. 4th Ed. 321 & 5th Ed. 350.

³ (1852) 22 L. J. Ex. 4, the case

was decided before the Sale of Goods Act 1892 by s. 18 (8) altered the law as to the effect of sending a bill of exchange with a bill of lading direct to the buyers; see § 208.

§ 188. In *Walley v. Montgomery*¹ the plaintiff ordered goods from the sellers, and they informed him that they had chartered a vessel for him and subsequently sent him a bill of lading to order or assigns endorsed in blank to him, freight payable by him, and an invoice of a cargo shipped "by order and on account and risk of" the plaintiff, and advised him that they had drawn on him at three months. Another bill of lading and the bill of exchange drawn on the plaintiff were sent to the seller's agent, who obtained delivery of the cargo; the plaintiff demanded the cargo from the agent and offered to accept the bills of exchange, but the agent demanded cash, which the plaintiff refused to give. Held the property had passed by the invoice and bill of lading, and the sellers had lost all rights over the goods save that of stoppage in transit. *Godts v. Rose*² must be distinguished: there the property had not passed and the refusal to give delivery without payment was justified by the contract and there had only been a conditional appropriation. In this case the seller unconditionally appropriated the goods by determining his election, and neither he nor his agent could subsequently impose fresh terms.³

§ 189.
Where contract imposes conditions.

If the contract however is that the property shall not vest unless bills of exchange are accepted⁴ or cash paid⁵ this is a condition precedent to the passing of the property. But a mere promise to send a banker's draft on receipt of the bills of lading is not a condition precedent for the delivery of the bill of lading and the remitting of the draft cannot be simultaneous, for the draft must be sent afterwards. When the bill of lading was endorsed

¹ (1808) 3 East. 585 cf. *Coxe v. Harden*, (1803) 4 East. 211, 7 R.R. 570 said by Benjamin to be unsound, 5th Ed. 392.

² (1854) 25 L. J. C. P. 61.

³ See § 195.

⁴ *Brandt v. Boulby*, (1831) 2 B. & Ad. 932 *Swain v. Shepherd*, (1832) 1 M. & R. 223.

⁵ *Moakes v. Nicholson*, (1865)

84 L. J. C. P. 273.

to the buyer and sent to him, the contract being for a banker's draft on receipt of the documents, held the property passed although no such draft was sent.¹ § 189.

In *Bryans v. Nix*² the plaintiff bought two cargoes of oats per boats Nos. 604 and 54, represented by two boat receipts whereby the master acknowledged receipt of the oats on board deliverable to the agents of the plaintiffs. The plaintiffs received on the 7th of February a letter from the seller dated 2nd containing the two receipts dated the 21st of January, and thereupon accepted bills of exchange which the seller stated in his letter were drawn against these oats. Boat No. 604 had received its cargo: boat No. 54 had not, although its receipt said it had. After boat No. 54 was loaded the sellers gave a delivery order to the defendants for both the boats which was accepted by the seller's agent. The defendant, the second buyer, obtained delivery of the oats; the plaintiff on his refusal to deliver them to him brought an action claiming that the oats were his as having been appropriated to his contract. It was decided that the property in the cargo of boat No. 604 had vested in the plaintiff; as it was held to be the intention of the consignor to vest the property in the consignee from the moment of delivery to the carrier, for a bill of lading being transmitted for valuable consideration operates as a change of property instanter when the goods are shipped.³ But it was held that the property in the cargo of boat No. 54 had not passed, the ground being that no specific chattels had been appropriated to that cargo. The receipt as there were no goods to be represented thereby was meaningless.⁴ It appears that a

¹ *Wilmshurst v. Bowker*, (1844); 12 L.J. Ex. 475 and see as to what amounts to sending goods on trust, § 374.

² *Huille v. Smith*, 1 B. & P. 568; *Anderson v. Clarke*, 2 Bing. 20.

³ Cf. *J. C. Shaw v. Bill*, (1884)

⁴ (1839) 4 M. & W. 775, 1 H. & H. 480. 8 M. 38.

§ 189. large portion of the cargo was on board when the plaintiff accepted the bills, and before the seller gave the defendants their order. Benjamin¹ therefore doubts the soundness of the decision, as conflicting with *Aldridge v. Johnson*.

Election
where goods
undivided.

In *Stock v. Inglis*² there were two separate contracts with different purchasers F. O. B. and the vendor shipped bags of sugar in the aggregate to answer both contracts, but had not appropriated the sugar as between the two buyers before it was lost. One buyer sued on an insurance policy. It was held that he had an insurable interest. Lord Selbourne said that the appropriation of goods to the aggregate of two contracts passed the property to the two purchasers in undivided portions of the goods.³ The question as to whether the property passed on shipment was much discussed.⁴

As to appropriation by bills of lading see *Gabarron v. Kreeft*.⁴

§ 190.
C. I. F.
Contract.

The position is well illustrated by a contract to ship goods C.I.F. The shipment of goods intended for the purchaser under a C.I.F. contract is *primâ facie* deemed to be delivery to him. The goods are at the risk of the purchaser. The property has passed⁵ conditionally of the bill of lading is in favour of the vendor merely to secure payment of the price ; unconditionally if drawn in favour of the buyer⁶ (and sent to him). If the seller ships goods

¹ 4 Ed. 326, he suggests that perhaps the contract was for an entire cargo.

² (1882) 10 Ap. Ca. 263, 12 Q. B. D. 564, 9 Q. B. D. 708.

³ Sed quære. The rest of the judges were against this. See Benj. 5th Ed. 356 and § 173.

⁴ L. R. 10 Ex. 274.

⁵ *Crozier v. Auerback*, (1908) 2 K.B. 161 C.A. in earlier cases it

was said to pass on tender of the bill of lading, *Wait v. Baker*, (1848) 2 Ex. 1, 17 L. J. Ex. 307; *Tregelles v. Sewell*, (1862) 7 H. & N. 574 and in a legal arbitration on transmission of a detailed invoice, see Scrutton on Bills of Lading, 5th Ed., p. 144.

⁶ *Biadell v. Clemens*, (1911) 1 K.B. p. 956, recently reversed by H.L. On other points, 28 T.L.R. 42.

not according to contract or fails to ship at all the breach of contract is committed there and then¹ and the buyer can reject such goods² unless he has waived the right,³ but if the goods are in accordance with the contract the property has passed,⁴ provided there is no condition attached to the appropriation which has not been fulfilled.² These principles do not seem to have been clear to the Court in a Calcutta case.⁵

§ 190.

Looking at these cases, with the exception of *Atkinson v. Bell* there does not seem to be any reason to suppose that had the Indian test of selection been applied instead of the English requirement of an overt act that any decision would have been different.

§ 191.
Indian cases.

In India the despatch of goods ordered unconditionally appropriated to the contract would be within section 84 and the property would thereby *primâ facie* be intended to pass, and certainly the handing over to the buyer of the shipping documents making the goods unconditionally deliverable to him would *primâ facie* be so.⁶ In a Bombay case⁷ it was held that goods ordered might be appropriated and the property thereby pass without any notice thereof being given to the buyers, but that there must be proof of an intention to so appropriate. In an early Calcutta⁶ case where a cargo was shipped in a ship chartered by the sellers with a bill of lading in the seller's name, Pontifex, J., held the property passed under section 84: Markby, J.,

Indian cases.

¹ *Ibid.*, p. 949.

² *Biddell v. Clemens*, (1911) 1 K.B. p. 956 recently reversed by H.L. 28 T. L. R. 42.

³ See under Waiver of Conditions Precedent where this case is discussed.

⁴ Whether under s. 84 or because the carrier is the buyer's agent to receive; see para. 213.

⁵ *Moll Schutte v. Luchmi Chand*,

(1898) 25 C. 505 F.B., where the form of the bill of lading is not given—a most material omission.

⁶ See *Buchanan v. Avdall*, (1875) 15 B.L.R. p. 284.

⁷ *Nasservanji v. Khambatta*, (1888) 13 B. 15 doubted in *Dadabhai v. C.J. Khambatta*, (1896) 22 B. 169, both cases of shipments contract void if ships did not arrive.

§ 191. said the case did not come under the Act but was a matter of intention.¹ In one case² it was argued that as the sellers had a right to select goods to meet a contract, the selection *per se* passed the property ; but the argument then relied on assent to such selection. Harrington, J., considered assent by the buyer necessary. But as in most of the cases³ there was evidence of subsequent assent, the decisions relied on this point, and there was no discussion of the more difficult question of election.⁴ The rule, however, is a well known part of the Common Law and is clearly referred to in the Code.⁵

§ 192.
When
breach of
contract
occurs on
improper
election.

The property passes as soon as the party having the election exercises it⁶; but only if no unfulfilled condition precedent exists⁷ and the goods selected comply with the contract.⁸ For if a seller having the right to select and ship the goods, fails to ship or ships goods not according to contract, the breach by him is committed then and there.⁹ But if the goods are lost at sea, the buyer must under a C. I. F. contract⁹ pay for them, and he must pay the price on tender of proper shipping documents, though any right to reject on arrival remains.¹⁰

¹ See § 213.

² *Findlay Muir v. Radhakesson*, (1909) 36 C. 736.

³ *Clive Jute Mills v. Ebrahim Arab*, (1896) 24 C. 177; *Juggernath Agarwallah v. Smith*, (1906) 34 C. 173; *J. C. Shaw v. Bell*, (1884) 8 M. 38.

⁴ In *Moll Schutte v. Luchmi Chand*, (1898) 25 C. 505 F.B. the point was left undecided and no mention of the shipping documents is to be found in the report.

⁵ Cf. for the analogous case of appropriation under contracts to ship goods in unnamed vessels the contract to be void if the vessel is lost: *Nasservanji v. Khamballa*, (1888) 18 B. 15 ;

Dadabhai v. Khamballa, (1897) 22 B. p. 196, obviously naming the vessel is not a condition precedent, see Benj. 5th Ed. 731 n. 2 unless so made by the contract, see *Ashmore v. Cox*, (1899) 4 Com. Cas. 52.

⁶ *Aldridge v. Johnson*, (1857) 26 L.J. Q.B. 296.

⁷ See § 189.

⁸ Benj. 5th Ed. 356, see para. 180.

⁹ *Biddell v. Clemens*, (1911) 1 K.B. 934, 949 C.A., citing *Parker v. Schuller* 17 T.L.R. 299 C.A.; *Crozier v. Auerback*, (1908) 2 K. B. 161.

¹⁰ *Biddell v. Clemens*, 28 T.L.R. 48, H.L. reversing the C.A.

CHAPTER IX.

Jus Disponendi.

But although the determination of an election may be complete and the appropriation perfect in one sense, yet the reservation of the right of disposal prevents it from being complete in that sense of the term which alone would pass the property.¹ This question of a reservation of what is called the *jus disponendi* will now be discussed. But the instructive observation of Mr. Chalmers² may be noted here, that in every case where the property has been held to pass, it will be found that there has been an actual or constructive delivery of the goods to the buyer.

§ 193.
Reservation of the control of the goods.

All rules for determining whether the property in goods has passed are rules of construction adopted for the purpose of ascertaining the real intention of the parties when they have failed to express it. And it is the same as regards the determination of an election : however complete and definite such determination may be, the property will not pass to the buyer, if the seller by his acts shows clearly his intention to retain the ownership notwithstanding such appropriation,³ if such intention is expressed in accordance with mercantile usage. Such intention is evinced where the seller when appropriating the goods reserves the right of disposal or the *jus disponendi*.

§ 194.
Depends on intention.

There is no provision in the Contract Act as to the reservation of the *jus disponendi*, but the right of so doing is referred to in illustration 4 to section 100 and was treated as clear law in *Juggernaut Agarwallah v. Smith*.⁴

In India.

The English Common Law rules are now codified in section 19 (1) of the Sale of Goods Act, which enacts that where there is a contract for the sale of specific goods or

Rule in England.

¹ See *Wait v. Baker*, (1848) 2 Ex. 1.

² 2nd Ed. p. 43.

³ *Benj.* 4th Ed. 345, 5th Ed. 382; *Wait v. Baker*, (1848) 2 Ex. 1.

⁴ (1906) 34 C. 173 C. A.

§ 194. where goods are subsequently appropriated to the contract, the seller may by the terms of the contract or appropriation reserve the right of disposal of the goods until certain conditions are fulfilled. In such cases notwithstanding, the delivery of the goods to the buyer or to the carrier or other bailee for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.¹ When the goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is *primâ facie* deemed to reserve the right of disposal.¹ The English section is chiefly based on *Mirabila v. The Imperial Ottoman Bank*.² The usual cases where the question arises is in contracts to supply goods under which the seller has to ship the goods to the buyer, but the right is not confined to such cases.

Not confined
to case of
shipment.

§ 195.
Sellers
cannot
exercise
the right if
property
passed.

The first point to be noticed is that in section 19 (1) of the Sale of Goods Act, the terms "specific goods" and "by the terms of the contract" are to be read together, and that the general opinion seems to be that "appropriation" only refers to unascertained goods.³ At any rate, it is clear law that if the property has passed, the seller cannot clog the buyer's right to possession by tendering delivery on terms unauthorised by his bargain.⁴ The property having passed the buyer has rights *in rem* over the goods, which can only be defeated by a condition subsequent created by the original contract⁴ whereby the passing of the property or the right of possession is rendered conditional as in the usual case where the possession being with the seller he has by implication his lien for the price,⁵ or

Unless the
contract so
provides.

¹ S. of G. . Act. 19 (2).

⁴ *Walley v. Montgomery*, (1803)

² (1878) 3 Ex. D. 164, 172 C.A.

³ East. 585: *Ogle v. Atkinson*,
(1814) 5 Taunt. 759.

⁵ See Benj. 5th Ed. p. 318 n.,
Kerr on the Sale of Goods Act ;
see Blackburn, 3rd Ed. 151.

⁵ *Goats v. Rose*, (1855) 17 C.B.
229.

having parted with possession there is a special term as to payment¹ or the like in the contract itself, or lastly in the exceptional case of the buyer's insolvency the unpaid seller may vary the consignment if the right to stop in transit exists.² **§ 195.**

Where the contract is for unascertained goods, although once the property has passed, that is if once the appropriation is final and unconditional, the position is the same as above stated,³ yet the seller may make the appropriation (whether that rests with him—*i.e.* where the contract gives him a right of election,—or where the buyer's assent to the appropriation is necessary,) conditional on payment, acceptances⁴ or the like,⁵ or he may, although the goods are so far ascertained that he can fulfil his contract with those goods only and the buyer is only bound to accept those goods,⁶ refuse to finally⁶ appropriate the goods so as to pass the property therein.⁷ It may be that he thereby fails to carry out his agreement to deliver goods, not any particular goods, but the buyer has no title to the goods themselves,⁸ even if he has paid for them⁹ or says he accepts the goods and offers payment,⁹ or though the goods are packed in the buyer's bags¹⁰ or shipped in the buyer's own vessel, sent for the goods, as his goods.¹⁰ For it is only in finally appropriated goods that the property **§ 196. Unascertained goods.**

¹ *Bishop v. Shillito* (1819) 2 B. & Ald. 329; *Loeschman v. Williams*, (1815) 4 Camp. 181.

² *The Contantia*, (1807) 6 Rol. 351; see *Eagleton v. E.I.R.*, 8 B.L.R. 581.

³ *Wilmshurst v. Bowker*, (1841) 5 Beng. N.C. 541; *Key v. Cotesworth*, (1852) 22 L.J. Ex. 4.

⁴ *Mirabita v. Imperial Ottoman Bank*, (1878) 8 Ex. D. p. 172 C.A.

⁵ *Turner v. Trustees of Liverpool Dock*, (1851) 6 Ex. 543;

Shepherd v. Harrison, (1869) L.R. 5 H.L. 116; *Ogg v. Shuter*, (1875) 1 C.P.D. 47 C.A.

⁶ *Turner v. Trustees of the Liverpool Docks*, (1851) 20 L.J. Ex. 398.

⁷ *Brandt v. Bowlby*, (1821) 2 B. and Ad. 932.

⁸ *Ellershaw v. Magniac*, (1843) 6 Ex. 570.

⁹ *Wait v. Baker*, (1848) 17 L.J. Ex. 307.

¹⁰ *Ogg v. Shuter*, *supra*.

§ 196. passes. Therefore the seller may so appropriate goods as to retain the right of control over them, and where goods are delivered on board the purchaser's ship in absence of any appropriation in fulfilment of the contract previous to shipment, the fact that the sender takes bills of lading in his own name or in a third party's name, or in a fictitious name, will *prima facie* reserve the right of control.¹

§ 197.
Seller
cannot
modify a
contract of
sale.

It has been said that the seller in such a case "continues to be owner contrary to the contract,"² but this only means that he thereby commits a breach of his contract to deliver unascertained goods and not that there is a breach of a contract of sale relating to appropriated goods.

§ 198.
Question is,
Has the
property
passed?

It should be noticed that under this heading the discussion is not whether the seller has fulfilled his contract, but whether the property in the goods has passed unconditionally to the buyer. For if the seller, after agreeing to give credit demands, whether the property has passed or not, cash before delivery he cannot succeed in a suit for non-acceptance³; but the buyer, unless the property has passed, cannot sue for the goods; he could sue for damages for non-delivery. The buyer, though he took possession, if the property had not passed or a condition precedent to his right to possession remained unfulfilled, could be sued for the goods.⁴ But if previous to the imposition of the new and unauthorised condition, the goods have been so appropriated as to pass the property unconditionally, then the buyer can, without complying with such new condition, sue for the goods as being his.⁵

¹ *Gabarron v. Kreeft*. (1875) L. R. 10, Ex. 274.

² *Per Eatle, J. Brown v. Hare*, (1858) 29 L. J. Ex. 6; see *Benj.* 5th p. 386.

³ *Spartali v. Benecke*, (1850) 19 L. J. C. P. 293.

⁴ *Godts v. Rose*, (1854) 25 L. J.

C.P. 61, where the Court took this view, but it construed the contract "free delivered and paid for in 14 days' by cash" as entitling the seller to demand cash on delivery.

⁵ *Walley v. Montgomery*, 8 (1803) 3 East. 585.

Similarly the seller may before the property has passed § 199.
reserve the right of control but not afterwards.

The general rule¹ is that where goods are delivered by the seller in pursuance of an order to a common carrier for delivery to the buyer, the delivery to the carrier passes the property, he being the agent of the buyer to receive them, and delivery to him is equivalent to delivery to the buyer,² for all purposes except that the right to stop in transit may arise.³ But where goods are delivered on board a vessel to be carried and a bill of lading is taken, the delivery by the seller is not to the buyer, but to the captain as bailee for delivery to the person indicated by the bill of lading as the one for whom they are to be carried.⁴ This presumption is universally recognised in England⁴ and is the rule in India.⁵ Consequently, the fact that the goods are by the bill of lading made deliverable to the order of the seller or of his agent, or in a fictitious name,⁶ is *prima facie* a reservation of the right of disposal so as to prevent the property passing to the buyer,⁷ for by so doing the seller *prima facie* constitutes the captain his agent, and until there has been a subsequent appropriation to the buyer no property passes.⁸

§ 199.
Effect of
delivery to
a carrier.

Where a bill
of lading is
taken.

¹ See per Lord Chelmsford in *Shepherd v. Harrison*, (1871) L. R. 5 H. L. 123, approving the statement of Law in Benjamin.

² See § 187 as to what amounts to shipment. Contract Act s. 91, S. of G. Act. s. 18 rule, 5 (2); *Wait v. Baker*, (1848) 2, Ex. 1.

³ Contract Act, s. 99, 100.

⁴ *Wait v. Baker*, (1848) 2 Ex. 1; *Moakes v. Nicholson*, (1865), 34 L. J. C. P. 273, 19 C. B. N. S. 290, 299; *Gabarron v. Kreeft*, (1875)

L. R. 10 Ex. 274, 281, 285; *Mirabita v. Ottoman Bank*, (1878), L. R. 3 Ex. D. 164, 172; *Shepherd v. Harrison*, (1871), L. R. 5 H. L. 116, 127, 128.

⁵ S. 100 illus. 4., *Juggernaut Agarwallah v. Smith*, (1906) 34 C, 173.

⁶ *Gabarron v. Kreeft*, (1875), L. R. 10 Ex. 274.

⁷ *Shepherd v. Harrison*, (1871) L. R. 5 H. L. 116 S. of G. Act, s. 19, (2), see however § 213.

⁸ *Baker v. Wait*, (1848), 2 Ex. 1.

Mates' receipts in sellers' names.

The same intention is shown *prima facie* where the seller takes mate's receipts in his own name,¹ for that generally entitles him to obtain the bills of lading.⁶

Onus of rebutting presumption.

The onus of rebutting such presumption is on the party denying it.²

Effects of endorsing bill of lading to buyer.

But where after taking the bills of lading in his own name the seller endorses them over to the buyer³ and delivers them to him unconditionally he thereby surrenders his right of disposal.⁴ But even where the bill of lading is obtained in the consignee's name, if the seller retains it, there is no presumption of an intention to transfer the property unconditionally,⁵ and the property does not pass if such bill and a bill of exchange are sent to a bank to secure acceptance of the latter before delivery of the former.

§ 200-Where goods are shipped.

The usual method of reserving control over the goods if shipped is to take bills of lading in the sender's name or in the name of his agent. The practice is to receive mate's receipts for goods shipped and the party in whose name these are made out is usually⁶ entitled to obtain bills of lading in exchange. If these mate's receipts are in the seller's name this shows a *prima facie* intention to control the disposal of the goods.⁷

Where sent by land.

It is the same in the case of carriage by land, if the carriers' receipts are in the seller's name.

¹ *Falk v. Fletcher*, (1865) 34 L. J. C. P. 148, see *Juggernaut Agarwallah v. Smith*, (1906) 34 C. 173.

² *Shepherd v. Harrison*, (1871) L. R. 5 H. L. p. 128.

³ *Baker v. Wait*, (1848), 2 Ex. 1.

⁴ *Brown v. Hare*, (1859), 27 L. J. Ex. 372; but see *Van Casteel v. Booker*, (1848) 2, Ex. 691, where it was treated as a matter of in-

tention; see also *Campbell* 2nd p. 375.

⁵ *Sheridan v. New Quay Co.*, (1858), 4 C. B. N. S. 618, 28, L. J. C. P. 58.

⁶ But see § 485.

⁷ *Craven v. Ryder*, (1816) 6, Taunt. 438; *Cawasjee v. Thompson*, (1845), 5 Moo. P. C. 165; *Falk v. Fletcher*, (1845), 18 C. B. N. S. 403).

The seller, usually, after obtaining the bills of lading in his own name, either sends them to his agent at the place of destination to retain until payment, or to a banker with whom he discounts bills of exchange, the banker to hold the bills of lading as security and to give them up to the buyer on payment. If he adopts either of these courses it is impossible to infer that he intended the property to pass to the buyer, even if the seller sends the buyer invoices setting out the numbers and marks of the goods. But there are cases in which the question is a very nice one.

§ 200.

The right can also be reserved although goods are shipped in a vessel chartered by the buyer, and bills of lading taken making the goods deliverable to the buyer, if the seller retains the only stamped copy,¹ although he sends an unstamped one to the buyer. But, generally, where delivery is to be in the buyer's ship and the bills of lading are taken in his name, there is no reservation of the right. Where a seller, the ship being the buyer's, took bills of lading to the buyer's order and retained three and gave a fourth of the set to the ship's master, it was held that there had been no reservation of the right of control; the fact of retaining three of the bills was immaterial, as they gave the seller no authority over the delivery of the goods.²

§ 201.
When right
can be
reserved.

When the ship is a general one retaining an endorsed bill of lading and sending the buyer an unendorsed copy, has been held sufficient.³

Where the bills of lading in the buyer's favour are sent to the seller's agent with a bill of exchange for

Sent to
sellers' agent.

¹ *Moakes v. Nicholson*, (1865), 34. L. J. C. P. 273.

² *Schotsmans v. L. & Y. Ry.* (1867), 36 L. J. Ch. 361 reversed on another point L.R. 2 Ch. 332. If the seller in such a case were to retain all the bills of lading, this

it seems would effect a reservation of the right,—(this was done in *Ex parte Golding* (1880) 13 Ch.D. 628)—until he gave a copy to the Captain.

³ *Brandt v. Bowlby* (1871), B & Ad. 932.

§ 202.
Unsuccessful
attempts to
reserve
control.

acceptance, the right is reserved until acceptance.¹ But if a bill of lading in the buyer's favour, and a bill of exchange are sent direct to the buyer, the right it seems is not reserved.²

In the following cases attempts to reserve the right were held to have failed. For although the question depends on intention, yet to be effective that intention must be expressed in accordance with mercantile usage.

§ 202.
Wrongful
retainer of
documents.

Where the seller wrongfully retained mate's receipts where the property passed by the contract and the goods were paid for, this was held ineffective.³

Where bills of lading were sent to the buyer, endorsed in blank, to order or assigns, although a second bill was sent to the seller's agent with a bill of exchange, and he obtained delivery, it was held that the property had passed by the invoice and bill of lading.⁴

So where the seller shipped goods in the buyer's own ship in exchange for other goods, and although admitting that the goods despatched were the buyer's, fraudulently obtained bills of lading in blank, and sent them to his agent to hold until bills of exchange were accepted,⁵ it was held that the property passed, although the bills of exchange were not accepted.

Retaining
some bills of
lading.

Where the seller delivered goods on the buyer's ship and took bills of lading in the buyer's name, the mere fact that the seller retained three bills of lading, the fourth being with the master, was held immaterial as the bills gave the seller no authority over the goods.⁶

Where draft
to be sent.

Where a banker's draft was to be sent against the bill of lading, it was held that in the particular case, the sending

¹ *Shepherd v. Harrison*, (1871) L. R. S. H. L. 116 explained in *Ex parte Banner*, (1876) 2 Ch. D. 278 C. A.

² See § 208.

³ *Cowasjee v. Thompson* (1845), 5 Moo. P. C., 165.

⁴ *Walley v. Montgomery*, (1803) 3 East. 585.

⁵ *Ogle v. Atkinson*, (1814) 5 Taunt, 759.

⁶ *Schotsmans v. L. & Y. Ry.*, (1867), 36 L.J. Ch. 361, 2 Ch. 332.

of the draft was not a condition precedent, so that a failure to do so, did not justify the seller in retaking the goods.¹

The mere advice of the drawing of a bill of exchange does not cut down the effect of the bill of lading endorsed to the buyer and sent to him,² for³ it is then placed beyond the seller's control. Nor does the property, if once passed in such a case, revert on the dishonour of the bills, or a refusal to accept them.³ It is different if the bill of lading is sent to the seller's agent to retain until a bill of exchange is accepted.⁴

Mere advice
of bill of
exchange.

In a Calcutta case⁵ the sellers in their contract stipulated for cash against mate's receipts, and that the buyers might have inspection of the mate's receipts, but that while being inspected the receipts were to be held in trust for the sellers and should be deemed to be the property of the sellers until payment. The sellers after obtaining mate's receipts in the buyer's name handed them to the buyers for inspection only. The buyers, without paying for the goods, exchanged the mate's receipts for bills of lading and pledged them. It was held the sellers having shipped the goods, the mate's receipt being in the buyer's name, and the goods being marked for the buyer, that as the buyers had assented to the appropriation, the property had passed, and there was no reservation of the right of control. It was also held that the appropriation was not intended to be conditional. The facts all point the other way, but the intention to reserve control, if it existed, was ineffectively expressed.

It is to be noted that where the seller has shown an intention or can be presumed to have an intention of reserving his right of disposal, the buyer cannot, by fraudulently obtaining bills of lading in his own name

§ 203.
Intention
cannot be
defeated
by fraud.

¹ *Wilnhurst v. Bowker*, (1841), L.T. 748 C.A.

10 L. J. C. P. 161, 12 L.J. Ex. 475.

⁴ *Shepherd v. Harrison*, (1871)

² *Ex parte Banner* (1876), 2

5 H. L. 116.

Ch. D. 178 C. A.

³ *König v. Brandt*, (1901) 84

⁵ *Juggernath Agarwallah v. Smith*, (1906) 83 C. 547, 84 C. 178.

without the seller's knowledge or consent, acquire the property in the goods, as when the seller has previously taken mate's receipts in his own name.¹ But now in England under legislation subsequent to the Contract Act innocent third parties obtaining interests for value in the goods are protected².

**§ 204.
Rebuttable
presump-
tion.**

Although taking bills of lading to the seller's order is nearly conclusive evidence of an intention that the property should not pass,³ yet this is a rebuttable presumption. For the question turns on the intention of the parties.⁴ In deciding the real intention of the parties the Court may look at all the facts of the case and consider not only the bill of lading but also the invoice, and the facts as to the transfer of the bill of lading.⁵

**§ 205.
Circum-
stances not
rebutting
the pre-
sumption.**

The following circumstances do not rebut such presumption. Delivery on board the buyer's own ship,⁶ even if the goods are described in the invoice "as freight free being the owner's property,"⁷ or are shipped on account of and at the risk of the buyer,⁸ even when the contract is that the property passes on payment and the buyer has overpaid the seller, but the payment has not been appropriated to the particular goods shipped,⁹ does not cut down the effect of taking bills of lading to the seller's order: nor does the fact that bills are taken in the buyer's name

¹ *Cravan v. Ryder*, (1816) 6 Taunt. 438; *Ruck v. Halfeld*, (1832) 5 B. and Ald. 632; *Schuster v. McKiller*, (1857) 26 L. J. Q. B. 281.

² *Cahn v. Pockett*, (1898) 68 L.J.Q.B. 515; see under § 108 for the Indian Law.

³ *Jenkyns v. Brown*, (1849) 19 L. J. Q.B. 286.

⁴ *Juggernaut Aggarwallah v. Smith*, (1906) 34 C. 173.

⁵ *Van Casteel v. Booker*, (1848) 2 Ex. 691.

⁶ *Ellershaw v. Magniac*, (1848) 6 Ex. 570; *Ex parte Banner*, (1876) 2 Ch. D. 278 C.A.; *Ogg v. Shuter*, (1875) 1 C.P.D. 47 C.A.

⁷ *Turner v. Trustees of Liverpool Docks*, (1851) 6 Ex. 543.

⁸ *Shepherd v. Harrison*, (1871) 5 H.L. 116, 127.

⁹ *Gabarron v. Krcejt*, (1875) L. R. 10 Ex. 274.

prevent the preservation of the right of control if the seller return the only stamped copy.¹ § 205.

Shipping the goods packed in the buyer's own sacks, does not prevent the seller from reserving the right.² Even if it is the seller's practice after taking bills of lading in his own name to endorse them over to the buyer, the taking of mate's receipts in his own name was held sufficient, as showing an intention to reserve the right at the time of shipment.³

The fact that credit is given to the buyer does not effect the case,⁴ the goods being originally unascertained. Credit.

It makes no difference if the buyer has previously paid for part or all of goods to be sent and goods are put on his ship sent for the purpose,⁵ and the seller writes to his own agent that he is shipping the goods and will send the bill of lading, for the seller can still reserve the right of control,⁵ if the price has not been paid for ear-marked goods.⁶ Payment.

The conclusion that *prima facie* the seller reserves the right of disposal when the bill of lading is to his order or to that of his agent, may be rebutted by proof that in so doing he acted as agent for the buyer and did not intend to retain control of the property and it is a question of fact to be determined on consideration of all the circumstances in the case what the real intention was.⁷ Presumption rebutted where seller acting as buyer's agent.

¹ *Moakes v. Nicholson*, (1865) 34 L.J.C.P. 290; see *Van Casteel v. Booker*, (1848) 18 L. J. Ex. 9; see *Sheridan v. New Quay Co.* (1858) 28 L.J. C.P. 58.

² *Ogg v. Shuter*, (1875) 1 C.P.D. 47 C.A.

³ *Falk v. Fletcher*, (1865) 34 L. J.C.P. 146.

⁴ *Craven v. Ryder*, (1816) 6 Taunt. 433.

⁵ *Ellershaw v. Magniac*, (1843) Ex. 570, where there was no

appropriation to any payment, but see *Cowasjee v. Thompson*, (1845) 5 Moo. P. C. 165, when the goods shipped had been paid for.

⁶ *Gabarron v. Kreeft*, (1875) L.R. 10 Ex. 274.

⁷ *Van Casteel v. Booker*, (1848) 2 Ex. 691; *Joyce v. Swann*, (1864) 17 C. B. N. S. 84; see *Moakes v. Nicholson*, (1863) 19 C. B. N. S. 290, 34 L. J. C. P. 273.; *Brown v. Hare*, (1858) 29 L. J. Ex. 6, 4 H. & N. 822, set out § 209.

§ 205. In *Joyce v. Swann*,¹ the jury found in spite of the fact that the bill of lading was to the seller's order or assigns, and sent to their agents, that the intention was that the property should pass; for an invoice was sent with "particulars" of goods delivered to account of buyers by sellers per the *Anne* and *Isabella*. The verdict was upheld, as the jury were warranted in holding that the goods were shipped in fulfilment of the contract. In this case there was no desire of retaining control of the goods for the seller's security. They acted as the buyer's agents if he intended to take the goods, and if not, they wished to take care of the goods.

§ 206.
Solely to
secure
price.

If the reservation is only for the purpose of securing the price, on tender of the price the property passes,² *secus* if the goods had been withdrawn from the contract.³

This distinction between *Mirabita's* case² and cases such as *Ellershaw v. Magniac*,³ *Gabaron v. Krcft*⁴ and in particular *Wait v. Baker*⁵ should be noticed. In each of these cases the sellers had dealt with the bill of lading for their own benefit and had entirely withdrawn the goods from the contract even though they thereby rendered themselves liable to an action for non-delivery,⁶ consequently a tender of the price or acceptances by the buyer as in *Wait v. Baker*³ was inoperative, the seller not consenting to pass the property, whereas in *Mirabita's* case the facts showed that the seller intended to secure the price only, and on tender by the buyer, that condition was performed and the property vested on him.⁷

¹ (1864) 17 C. B. N. S. 84.

² *Mirabita v. Ottoman Bank*, (1878) 3 Ex. D. 164 C. A.; see *Biddell v. Clemens*, (1911) 1 K. B. p. 956.

³ *Baker v. Wait*, (1848) 2 Ex. 1.

⁴ (1843) 6 Ex. 570.

⁵ (1875) L. R. 10 Ex. 274.

⁶ The contracts being to deliver goods, unless the sellers appropriated them finally, no property could pass.

⁷ *Mirabita v. Ottoman Bank*, (1878) 3 Ex. D. p. 170, 177; cf. *Biddell v. Clemens*, (1911) 1 K. B. p. 956.

When the bills of lading are in favour of the sellers' agents, *qua* agents, because the payment is to be made to them, the sellers retain to that extent the dominion over the property which, if they had made the bill of lading without any condition, they would not have retained.¹ It makes no difference if the bill of lading so drawn is sent to the buyers to be retained against their acceptance of an enclosed bill.¹

§ 207.
Bill of lading may be endorsed conditionally.

For a bill of lading may be endorsed to the buyers, subject to conditions, and then until the conditions are fulfilled no property passes in the goods.³

Where the seller transmits either directly to the buyer or to his own agent to be presented to the buyer a bill of lading endorsed to or in favour of the buyer accompanied by a bill of exchange for the price, at Common Law the question whether the property passed to the buyer depended *prima facie* on which of these two causes the seller adopted.³ If the bill of lading was sent direct to the buyer the presumed intention was that the property should pass³ but if the documents were sent to the seller's agent the presumption was that the property should not pass until acceptance or payment:⁴ and on tender of acceptances or payment, it passed.⁵

§ 208.
Sending bill of exchange and bill of lading to the buyer.

Common Law.

In *Brandt v. Bowlby*,⁶ it was held that sending an unendorsed bill of lading to the buyer with a bill of exchange, but at the same time notifying that an endorsed bill had been sent to agents, showed an intention that the property should not pass although the goods were shipped in a vessel chartered by the buyers.

¹ *The Charlotte*, (1908) P. 206, 216 C. A. 77 L. J. P. 132; 99 L. T. 380, 34 T. L. R. 416; 11 Asp. M. C. 87.

² *Wilmhurst v. Bowker*, (1843) 12 L. J. Ex. p. 475; *Barrow v. Coles*, (1811) 3 Camp. 92.

³ *Ex parte Banner*, (1876) L.R.

2 Ch. D. 278 C.A.

⁴ *Shepherd v. Harrison*, (1869), L.R. 4 Q.B. p. 203, 204 (1871), L. R. 5 H.L. 116; see *Wilmhurst v. Bowker*, (1841), 10 L.J.C.P. 161.

⁵ *Mirabita v. Imperial Ottoman Bank*, (1878) 3 Ex. D. p. 172.

⁶ (1881), B. & Ad. 932.

§ 208.

So in *Shepherd v. Harrison*,¹ where the bill of lading was sent to the seller's agent and forwarded by him to the buyer with a bill of exchange, it was held that the property had not passed, as the seller refused to accept the bill of exchange.

In *Ogg v. Shuter*² although a bill of lading was to the seller's order and sent by him to his agent who presented it together with a draft to the buyer, who refused to accept the draft, the Lower Court held that the reservation of the right of disposal manifested *prima facie* by the words "cost against bill of lading," and by the fact that the bill of lading was taken to the seller's order, was overridden by the other terms of the contract providing for delivery free on board, and for part payment of the price, coupled with the fact of delivery into the buyer's own sacks. The Court of Appeal reversed the decision, holding that the retention by the seller in his agent's hands of the bill of lading in the form in which it was taken was effectual to reserve the right of disposal, and that the right so reserved was not merely a seller's lien but involved a right to dispose of the goods by sale or otherwise so long as the buyer remained in default.

§ 209.
But ques-
tion turns
on inten-
tion.

But what is intended to be reserved is a question of intention, and the facts may show that the seller only intended to preserve his lien, *i.e.* to secure the price by controlling the possession of the goods. Where the seller took the bill of lading in his own name but after endorsing it over to the buyers, sent it to his own agent with a bill of exchange, and invoice specifying the casks sent by marks and numbers, the contract being F. O. B. to be paid for by acceptance of a bill of exchange on receipt of the shipping documents, the jury said that the intention was that the property should pass, and the Appeal Court

¹ (1871) L. R. 5 H. L. 116; *cf.*
Rew v. Payne, (1886) 53 L.T. 982.

² (1875) 45 L.J.C.P. 45.

refused to upset them¹: all the Court had to decide was whether the mode of dealing with the bill of lading necessarily prevented the property from passing.

In England the Sale of Goods Act provides by section 18 (3) that "where the seller of goods draws on the buyer for the price and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange and if he wrongfully retains the bill of lading the property in the goods does not pass to him."

§ 210.
Under Sale
of Goods
Act.

The only case on the section is *Cahn v. Pockett*² where the view was taken that the section covered the case of a direct transmission to the buyer of an endorsed bill of lading.

Benjamin³ considers that this alters the Common Law but that the section is subject to a contrary intention being expressed. All the section does is to alter a somewhat curious Common Law presumption that the seller had in such circumstances no intention of preventing the property from passing. Further the section only says that the result follows if the documents are sent to secure acceptance or payment; and it seems that if that intention was proved even at Common Law the same result followed.⁴

But even under the Sale of Goods Act the transmission of a bill of lading and a bill of exchange to the buyer if not transmitted together, does not suspend the vesting

¹ *Brown v. Hare*, (1858), 27 L.J. Ex. 372, 29 L.J. Ex. 6. The difficulty about this decision is that the buyer had still to give a bill, and generally speaking on a reservation to secure the price the property passes conditionally on such payment: S. of G. Act s. 19; see *Biddell v. Clemens*, (1911) I.K.B. p. 956 set out in § 190; *Moakes v. Nichol-*

son (1863) 34 L.J. C.P. 273, but the jury found that the intention was not to prevent the property passing but to control the possession; only in practice this is not likely to recur.

² (1898) 2 Q.B. 61; (1899) 1 Q.B. 643 C.A.

³ 5th Ed. 398.

⁴ See *Brown v. Hare*, *supra*.

§ 210. of the property.¹ Nor if the bills are presented by third parties.² For when the seller transmits direct to the buyer a bill of lading making the goods deliverable to the buyer's order, unaccompanied by a bill of exchange whether drawn by the seller or not, or accompanied by a bill of exchange other than one drawn by the seller on the buyer, *prima facie* the property in the goods vests unconditionally in the buyer and does not revert in the seller on the dishonour of the bill.³ The same result follows when the buyer is in return for the bill of lading to pay cash or to send a banker's draft or to make a promissory note.⁴

None of these cases have been affected by the Sale of Goods Act. But in every instance the question depends on the intention, and if the contract makes payment or acceptance of bill a condition precedent or concurrent with delivery, the condition is good.⁵ So in a sale for cash the property does not pass until payment although the goods are delivered to the buyer.⁵

§ 211.
Indian rule.

Whether the Indian courts will adopt the presumption in section 19 (3) of the Sale of Goods Act has yet to be decided, but semble the presumption is manifestly reasonable and will be acted upon,⁶ though it would be advisable to indicate clearly such intention as by endorsing the bill subject to that condition,⁷ or to proceed as the seller did in *re Charlotte*.⁸

¹ *Ex parte Banner*, (1876), 2 Ch. D. 278 C.A.

² *König v. Brandt*, (1901) 84 L. T. 748 C.A.

³ *Ex parte Banner*, (1876), 2 Ch. D. 78; *Key v. Colesworth*, (1852), 7 Ex. 595; *König v. Brandt*, (1901), 84 L.T. 748 C.A.

⁴ *Wilmhurst v. Bowker*, (1844), 7 M. & G. 882, 12 L.J. C.P. 475.

⁵ *Weiner v. Gill*, (1905) 2 K.B.

172; see *Juggernaut Agarwallah v. Smith*, (1906) 34 C. 173 C.A.; cf. *Baleman v. Green*, Ir. R. 2 C. L. 166.

⁶ In *Juggernaut Agarwallah v. Smith*, (1906) 33 C. 547, 34 C. 173, the mates' receipts were sent with a bill for the price.

⁷ *Wilmhurst v. Bowker*, (1843) 12 L.J. Ex. p. 475.

⁸ Set out § 207.

The obvious objection to the presumption is that the seller has given the buyer control of the goods, which he need not have done for he can endorse the bill of lading restrictively. But the same objection applies where the documents are sent through an agent, for the English rule does not require the agent not to post the documents to the buyer. § 211.

In America the Common Law rule has not been followed, and where both documents are sent direct to the buyer, he has no right to the goods unless he accepts the bill of exchange.¹ American law.

Once there has been an effective reservation of the right of disposal, the buyer can only obtain the property in the goods either by a subsequent appropriation mutually agreed to, although there is a contract to deliver a cargo on board a ship chartered by the seller on behalf of the buyer, and to assign that cargo by endorsing a bill of lading to the buyer,² or by the seller doing some further act of appropriation³; unless the reservation is merely to secure the price, when payment or tender thereof passes the property.⁴ § 212.
How property passes after reservation.

In the foregoing pages it has been assumed that *prima facie* the reservation of the right of control prevents the property from passing. This was Benjamin's view⁵ before the Sale of Goods Act which has enacted that the property does not pass⁶ until the conditions subject to which the right of disposal is reserved are fulfilled. At Common Law the property did not pass unless the reservation was merely to control the possession as security for the price;⁷ or unless the seller acted as the buyer's § 213.
Passing of the property.

¹ *Chicago v. Wright*, 48 N.Y. 1; *Chicago v. Bayley*, 115 Mass. 228; *Alderman v. E. R.*, 115 Mass. 233.

² *Baker v. Wait*, (1848), 17 L.J., Ex. 307.

³ *Van Casteel v. Booker*, (1848) 2 Ex. 691.

⁴ See § 206.

⁵ 4th Ed. Chapter on *Jus disponendi*; and see ante § 199.

⁶ S. of. G. Act, s. 19.

⁷ When the property and risk did. *Brown v. Hare* (1858), 27 L. J. Ex. 372, 29 L. J. Ex. 6; but see note 1 § 209.

§ 213. agent.¹ If the reservation was for the sole purpose of securing the price, the property did not pass until payment¹ or tender thereof, and the seller had not merely a lien on the goods but a right to dispose of them so long as the buyer was in default,² but not after a tender of the price.¹

Blackburn³ stated that there may possibly be some doubt as to whether the principle of those cases which settle that goods despatched by the seller are the property of the buyer, is that the seller is thereby determining a right of election, or that the carrier is the buyer's agent to receive⁴ the goods. If the latter is the principle, a reservation of the right of control by making the carrier the seller's agent, prevents the property from passing: if the former, that result does not necessarily follow but depends on the intention with which the goods were delivered and on the terms of the contract.

But apart from any question of whether a reservation of the right of control is contrary to the contract, an election can only be exercised in accordance with the authority previously given by the buyer to the seller under the contract, and a clogged appropriation is not, except in very exceptional cases, authorised by the buyer, and therefore no property can pass thereby.

In India the question arises in connection with the passing of the risk, and it seems clear that unless the reservation is only made to control the possession⁵ or the sellers are acting as the buyer's agents,⁶ no property passes and the risk is with the seller.

¹ *Mirabila v. Ottoman Bank*, (1878) 3 Ex. D. 164.

² *Ogg v. Schuler*, (1875) 1 C.P.D. 47 C.A.

³ Reproduced in the 3rd Ed., p. 148.

⁴ This is the generally accepted view, see § 199.

⁵ *Brown v. Hare*, (1858) 29 L.J. Ex. 6, see note 1 p. 189 s. 209.

⁶ *Van Casteel v. Booker*, (1848) 2 Ex. 691; *Joyce v. Swann*, (1864) 17 C.B. N.S. 84.

The Indian decisions are not very satisfactory. Where an unascertained cargo was ordered and subsequently shipped on a ship chartered by the sellers, bills of lading in the seller's name, Markby, J.¹, thought it was a matter of intention not governed by the Contract Act and that the property did not pass. Pontifex, J.¹, thought the property passed under section 84, that is by election.² The view taken in a recent case was that on an effective reservation the property would not have passed.³

Indian decisions.

Section 78 not being exhaustive does not cover the case. Illustration (b) to section 100 seems to show that the property does pass,⁴ but Markby, J.¹, is doubtless correct.⁵

Where an agreement is made for the sale of immoveable and moveable property combined, the ownership of the moveable property does not pass before the transfer of the immoveable property.

Section 85.
Transfer of ownership of moveable property when sold together with immoveable.

Illustration.

A agrees with B for the sale of a house and furniture. The ownership of the furniture does not pass to B until the house is conveyed to B.

This section is apparently taken from Addison and the illustration⁶ from *Lanyon v. Toogood*.⁶ The contract is a combined one and no property passes until its conclusion.⁷ The rule does not apply to simultaneous but separate contracts for the sale of a house and of its furniture, but it makes no difference if it is a combined contract that the goods are sold at a separate price.⁸

§ 214.
Combined sale of land and goods.

¹ *Buchanan v. Avdall*, (1875) 15 B.L.R. p. 284.

² This view was taken in *Lilladhar v. Wreford*, (1892) 17 B. 62, 76, but Farrar J. was very uncertain.

³ *Juggernaut Agarwallah v. Smith*, (1906) 34 C. 173.

⁴ The illustration is probably

merely an inadvertence.

⁵ 6th Ed. 182.

⁶ 13 M. & W. 29.

⁷ For limitation in such a case see *Dhondiba v. Ramchandra*, (1881) 5 B. 554.

⁸ *Neal v. Viney* (1808) 1 Camp. 471.

Section 86.

Buyer to
bear loss
after goods
have become
his property.

When goods have become the property of the buyer, he must bear any loss arising from their destruction or injury.

Illustrations.

(a) *B* offers, and *A* accepts, 100 rupees for a stack of firewood standing on *A*'s premises, the firewood to be allowed to remain on *A*'s premises till a certain day, and not to be taken away till paid for. Before payment, and while the firewood is on *A*'s premises, it is accidentally destroyed by fire. *B* must bear the loss.

(b) *A* bids 1,000 rupees for a picture at a sale by auction. After the bid it is injured by an accident. If the accident happens before the hammer falls, the loss falls on the seller, if afterwards, on *A*.

§ 215.
Incidence
of risk.

Under the English Common Law the general rule is the same.¹ The matter is, however, one of intention² and the difficulty of determining such intention is well illustrated by the diversity of judicial opinion in the case of the *Calcutta Co. v. De Matlos*.³ The parties may agree that the property shall vest and risk attach on shipment,³ or only on delivery at the destination,³ or that the property shall vest on shipment, but that the price or part of it shall not be payable until arrival of the goods.³

No criterion
of ownership.

Being a matter subject to the intention of the parties, the incidence of the risk is no sure criterion of ownership.⁴ It is a question depending entirely upon the terms of the contract,⁵ or may be inferred from any particular mode of dealing between the parties,⁶ or usage of their trade.⁷

¹ *Soshi Mohun Pal v. Nobo Kristo*, (1878) 4 C. 801.

L.J. Ex. 44.

² *Anderson v. Morice*, (1874) 1 A. C. p. 728 H. L.; *Martineau v. Kitching*, (1872) L. R. 7 Q. B. p. 453.

⁵ *Shepherd v. Harrison*, (1871) 40 L.J. Q. B. 115 H.L.; *Castle v. Playford* supra; *Martineau v. Kitching*, (1872) L.R. 7 Q.B. 486.

³ (1864) 33 L.J. Q.B. 214, 32 L.J. Q.B. 322.

⁶ *Dunlop v. Lambert*, (1839) 6 Cl. & Fin. 600 H.L.

⁴ *Stock v. Inglis*, (1885) 10 A.C. 263; *Castle v. Playford* (1870), 41

⁷ *Anderson v. Morice*, (1874) 1 A. C. p. 728 H.L.; *Martineau v. Kitching*, (1872) L. R. 7 Q. B. p. 453.

But if the buyer is to be saddled with the risk before the property vests in him, such inference must be clear.¹ § 215.

If it is shown that the risk attached to the one party or the other, it is a very strong argument for showing that the property was meant to be in him. But the two things are not inseparable. It may very well be that the property shall be in the one, and the risk in the other.² Cockburn, C.B., thought that if a party assumes the risk by his contract that would show that the property was not in him.³ This is the American view.³

The fact that one party is to insure is strong evidence as to the incidence of risk being with him.⁴ In *Anderson v. Morice*⁵ the House of Lords was divided on the point as to whether insurance by the buyer of the whole cargo covered part of a cargo, the result was that the lower Court's judgment was affirmed. The question was whether "cargo" meant an entire cargo. It seems that the Privy Council really reduced this to a decision on the particular meaning⁶ attached to the word cargo in that case. § 216. Insurance.

Where the risk is *primâ facie* intended to pass when certain stages are reached as on completion of loading, until that is done the buyer has neither the risk nor an insurable interest,⁷ but the *primâ facie* presumption may be rebutted.⁸ Risk to pass at certain stages.

¹ *Shepherd v. Harrison*, (1871) 40 L.J. Q.B. 148 H.L.; *Castle v. Playford* supra; *Martineau v. Kitching*, (1872) L.R. 7 Q.B. 436.

² *Martineau v. Kitching*, (1872) 41 L.J. Q.B. 227.

³ *The Elgie Cotton Mills*, (1874) 22 Wall. 180; see Benj. 5th Ed. 404.

⁴ *Fragano v. Long*, (1825) 4 B. & C. 219; *Alexander v. Gardner*, (1835) 1 Bing. N. C. 671. Otherwise the insurance would be nugatory, see per Kennedy, L. J., in *Biddell v. Clemens*, (1911) 1 K. B. 934 C. A.

The rest of the Court considered that in spite of the buyer's insurance, the risk was with the seller: reversed on other points, 28 T.L.R. 42.

⁵ (1876) 1 Ap. Ca. 713 in Ex. Ch. L.R. 10 C.P. 609.

⁶ *Colonial Ins. Co. v. Adelaide*, (1886) 12 Ap. Ca. 128, where it was held a buyer had an insurable interest in goods which he had an option to reject.

⁷ *Anderson v. Morice*, (1876) 1 Ap. Ca. 713 in Ex. Ch. L. R. 10 C.P. 609.

⁸ *Stock v. Inglis*, 9 Q.B.D. 708.

§ 216.
Contract for
entire
quantity.

When the goods contracted for are an entire quantity it is a question depending on the terms of the contract and the circumstances of the case whether the insurance covers and the risk attaches to the quantity of goods when completed only or also to each separate instalment when delivered.^{1 & 2}

§ 217.
F.O.B.

Brett, M. R., was of opinion that the effect of a contract to deliver goods free on board even when the contract is not for specific goods, and the goods have not been appropriated to answer the contract, (as in the case under consideration,) is that the goods when put on board, are at the buyer's risk, and that the shipment in such circumstances passes the risk though not the property in the goods to the purchaser.³

§ 218.
C.I.F.

In a contract C. I. F. Liverpool the goods are *prima facie* at the risk of the buyer when shipped subject to the right to reject:⁴ and if the goods are lost at sea, the buyer must pay the price against the bill of lading and the policy of insurance, such documents being in due order.⁵ If the seller takes the bill of lading in his own name to secure payment of the price, the property passes conditionally⁶ and until the condition is fulfilled the risk is with the seller. If the bill of lading is in the buyer's name the property passes⁵ unless there is an unfulfilled condition.

§ 219.
Risk may
be divided.

The parties may expressly or by necessary inference, divide the risk between them, and where the parties have failed to make such an agreement for themselves the law

¹ *Colonial Ins. Co. v. Adelaide*, (1886) 12 Ap. Ca. 129, where it was held a buyer had an insurable interest in goods which he had an option to reject.

² *Anderson v. Morice*, (1876) 1 Ap. Ca. 713 in Ex. Ch. L.R. 10 C.P. 609.

³ *Stock v. Inglis*, (1882) 12

Q.B.D. p. 573 ; but see *Ex parte Golding*, (1880) 13 Ch. D. 628, see para. 261.

⁴ *Tregelles v. Sewell*, (1862) 7 H. & N. 574 ; *Crozier v. Auerback*, (1906) 2 K. B. 161 C.A.

⁵ *Biddell v. Clemens*, (1911) 1 K.B. 934, p. 950, 959 C.A., reversed on other points, 28 T.L.R. 42.

may imply an agreement from the circumstances in order to do justice between the parties.¹ Such a case may arise when the parties are at a distance from one another, and the goods are of a nature liable to be effected by transit. The risk of loss or accident will by this section *primâ facie* attached to the ownership. But suppose the seller has besides contracting to despatch the goods contracted to supply goods fit for some purpose of the buyers or to send merchantable goods. That the goods should be fit or merchantable when they are sent off is to the knowledge of both not enough ; they must be fit or merchantable on arrival. Here the seller is presumed to have agreed that the goods shall be fit or merchantable on arrival and so to have taken the risk of their not arriving in a fit state in the ordinary course of transit and the buyer has assumed the other risks of ownership, such as loss or accident.²

§ 219.

Where by contract goods to be merchantable on arrival.

Similar principles according to Benjamin³ apply when the seller agrees to deliver by a particular time ; it being part of his contract that the goods shall arrive by that time, he takes that risk, but there is no necessity to imply that he takes any other risk ; so if the seller engages to deliver at their destination merchantable goods, the buyer would take the risk of any deterioration in transit which was to the knowledge of both parties inevitable, but the seller as owner takes all other risks.⁴

Delivery by a particular time.

If specific goods agreed to be sold perish without any fault on the part of the seller or buyer, before the risk passes to the buyer the contract is avoided.⁵

§ 220.
Perishing of specific goods.

The corresponding provisions of the Sale of Goods Act are in sections 20, 32 and 33, and the law in England besides paying regard to the intention of the parties,

§ 221.
Effect of delay.
English law.

¹ *Calcutta Co. v. De Mattos*, (1864) 33 L. J. Q. B. 214 ; 32 L. J. Q. B. 322.

² See *Beer v. Walker*, (1877) 46 L. J. C. P. 677 (rabbits).

³ 5th Ed. 414, see *Bull v.*

Robinson, (1854) 10 Ex. 342.

⁴ See *Bull v. Robinson*, (1854) 10 Ex. 342.

⁵ S. of G. Act s. 7. Contract Act 364 and *sec* 'Fallure of Consideration' § 114.

§ 221. provides that where delivery has been delayed through the fault of the seller or buyer, the risk as regards any loss which might not have occurred but for such default is with the party in default. The only authority at Common Law on the point is a dictum of Blackburn, J., that the party causing a delay in the transfer of the property must take the risk.¹ The Sale of Goods Act² has extended this to delay in delivery, but instead of imposing the whole risk on the party in default only makes him liable for loss which might not have occurred, and this seems to throw on the party in default the onus of showing that the loss would have occurred independently of his default.³

Indian law. There is no provision on the point in the Contract Act and no decision deals with this question. The original draft of the Sale of Goods Act was "loss which would not have occurred." Under the Civil law⁴ which has been adopted by the French Civil Code⁵ a seller delaying delivery was responsible for loss which would not have occurred but for his default.

Where seller is a bailee. It has been said that a seller in possession after the property has passed is a bailee:⁶ if so he is not liable for any loss unless it be through his default.⁷ But even if the buyer refuse to accept the seller cannot indefinitely saddle him with the risk of rejected goods.⁸

A buyer may also be a bailee if he is in possession under a hire purchase agreement or under a contract for sale or

¹ *Martineau v. Kitching*, (1872) L. R. 7 Q. B. 436.

² See s. 20.

³ Benj. 5th Ed. 415, where it is said that in America a party delaying is only liable for loss which is the necessary consequence of his default, *McConche v. N. Y. & Lake Co.*, (1859) 20 N. Y. 495.

⁴ Chalmers 6th Ed. 55.

⁵ Arts. 1302, 1303.

⁶ Chalmers 6th Ed. 55, so held in America, *Koon v. Binkeroff* (1896), 39 Hun. 130; Story on 'Sales' ss. 300a, 300b, 393; cf. the case of a carrier, *Carrus v. Robins* (1841) 8 M. & W. 258; and a vendor of land, *Clarke v. Ramuz*, (1891) 2 Q. B. 456.

⁷ Contract Act 151, 152.

⁸ *Prag Narain v. Mulchund*, (1897) 19 A. 535.

return, or is in possession of rightly rejected goods. **§ 221.**
 Whether the seller or buyer is a bailee his liability is governed by section 151 of the Contract Act, and it seems that if either wrongfully refuse to deliver or redeliver goods or by his default delay the delivery or redelivery section 161 applies and he is an insurer, and conversely if by the default of the other party the delivery or redelivery is delayed the bailee can charge for necessary expenses for safe custody.¹
 If the buyer delays the passing of the property it seems the risk is with him,² and of course if the seller delays it the risk remains with him.

Effect of
delay in
delivery.

Delay in
passing
property.

Under section 32 (2) of the Sale of Goods Act the seller unless otherwise authorised by the buyer,³ must make such a contract with a carrier to whom the goods are delivered, on behalf of the buyer as may be reasonable. Section 91 of the Contract Act⁴ deals with the Indian law, and makes it imperative that the contract with the carrier or wharfinger shall enable the buyer to hold him responsible for the safe custody or delivery of the goods, otherwise the buyer is not responsible for the price, if the goods do not reach him.

§ 222.
**Seller's
duty when
goods sent
to carrier.**

Section 33 of the Sale of Goods Act⁵ provides that the buyer when the seller agrees to deliver at his own risk must bear the loss due to deterioration necessarily incident to the course of transit. This it seems would also be the rule in India.

§ 223.
**Deteriora-
tion in
transit.**

A necessary corollary is that any accretion or benefit to the goods also attaches where the risk attaches.⁵

§ 224.
Accretions.

Where the buyer assumes the risk of delivery, the price must be paid even if the property has not passed, if the

§ 225.
**Where
buyer
assumes
risk of
delivery.**

¹ Cf. *G.N.R. v. Swaffield*, (1874) L. R. 9 Ex. 132 (a carrier by land); *Cargo Ex Argos*, (1872) L. R. 5 P. C. 134 (master of ship); see § 267.

² *Martineau v. Kitching*, (1872) L. R. 7 Q. B. 436.

³ *Clarke v. Hutchins*, (1811) 14 East. 475.

⁴ See note to that section.

⁵ *Sweeting v. Turner*, (1872) L. R. 7 Q. B. 310; cf. *The Vondobala*, (1887) 18 P. D. p. 47.

§ 225. goods are destroyed before delivery.¹ But as the presumption is that the risk and property go together, the intention of the purchaser must either be expressed in the written contract or clearly to be inferred from the circumstances.¹

§ 226.
Risk with
buyer
where
seller has
his lien.

Although the risk is with the purchaser the contract may provide that there shall be no delivery until payment of the price, even though the payment be deferred by the contract.²

§ 227.
Where
buyer may
return
goods.

If a buyer has an option to return goods, the risk while the option lasts is with the seller ; ³ and even if return of the goods is the buyer's only remedy, the risk until the time for returning expires, is with the seller.⁴

§ 228.
While the
buyer has
the right to
reject
goods.

While the buyer has the right to reject goods although the seller has purported to exercise a right of election, the risk remains with the seller,⁵ for unless the appropriation is in accordance with the contract the property can only pass by subsequent assent.

But if after goods are shipped appropriated to the contract, they are lost, it has been held⁶ in a C. I. F. contract that the buyer must pay for them on tender of proper documents and the risk is with him although he might have rightly rejected the goods on arrival.

§ 229.
While in
transit.

Where goods are in the course of transit⁷ the risk is with the buyer until stoppage, for the property is with him⁸ After stoppage, the risk is still with the buyer

¹ *Castle v. Playford*, (1870) L.R. 5 Ex. 165, 7 Ex. 99; *Martineau v. Kitching* (1872), L.R. 7 Q.B. 436

² *Tarling v. Baxter*, (1827) 6 B. & C. 360; *Walker v. Clyde*, (1861) 10 C.B.N.S. 381; *Moakes v. Nicholson*, 19 C. B. N. S. 290 (1865).

³ *Head v. Tattersall*, (1871) L. R. 7 Ex. 7.

⁴ *Chapman v. Withers*, (1888), 20 Q. B. D. 824; cf. *Elphick v. Barnes*, (1880) 5 C. P. D. 321.

⁵ *Perkins v. Bell*, (1893), 62 L. J. Q. B. 91, (1893) 1 Q. B. 198 C. A.

⁶ *Biddell v. Clemens*, (1911) 1 K. B. 984 C. A.; reversed on other points 28 T.L.R. 42.

⁷ But not if the seller undertakes to deliver at a particular place, see § 158.

⁸ The seller has no insurable interest, *Clay v. Harrison* (1829) 10 B. & C. 99.

unless the seller unduly delays in exercising his right of resale. Probably the principle of section 20 of the Sale of Goods Act applies in such a case.¹ § 229.

Where there is a contract for the sale of goods not yet in existence, the ownership of the goods may be transferred by acts done, after the goods are produced in pursuance of the contract, by the seller, or by the buyer with the seller's assent.

Section 87.
Transfer of ownership of goods agreed to be sold while non-existent.

Illustration.

- (a) *A* contracts to sell to *B* for a stated price, all the indigo which shall be produced at *A*'s factory during the ensuing year. *A* when the indigo has been manufactured, gives *B* an acknowledgment that he holds the indigo at his disposal. The ownership of the indigo vests in *B* from the date of the acknowledgment.
- (b) *A* for a stated price, contracts that *B* may take and sell any crops that shall be grown on *A*'s land in succession to the crops standing at the time of the contract. The ownership of the crops, when taken possession of, vests in *B*.
- (c) *A* for a stated price, contracts that *B* may take and sell any crops that shall be grown on his land in succession to the crops then standing. Under this contract, *B* applies to *A* for possession of some crops grown in succession to the crops which were standing at the time of the contract. *A* refuses to give possession. The ownership of the crops has not passed to *B* though *A* may commit a breach of contract in refusing to give possession.

Pollock considers that this section is covered by section 83 and Cunningham and Shepherd suggest that under sections 83 and 84 there must be assent of the buyer to

¹ See under "Resale."

§ 230. any act of the seller. But it is clear that the buyer has by implication of law, given a previous consent.¹ In English law similar rules apply to cases of present sales of future property.²

As has already been pointed out "acts" probably mean that the Common Law rule of election applies.

If as the first illustration suggests this section includes goods to be manufactured, and the expression goods not yet in existence is certainly wide enough, this is a new provision though in many such cases the contract at Common Law gave an election to the seller, *e.g.* if the goods had to be despatched by him, though generally the appropriation of goods when made had to receive the buyer's assent.³

Section 88.
Contract to
sell and
deliver, at a
future day,
goods not
in seller's
possession
at date of
contract.

A contract for the sale of goods to be delivered at a future day is binding, though the goods are not in the seller's possession at time of contract, and though, at that time, he has no reasonable expectation of acquiring them otherwise than by purchase.

Illustration.

A contracts, on 1st January, to sell B 50 shares in the East Indian Railway Company, to be delivered and paid for on 1st March of the same year. A at the time of making the contract, is not in possession of any shares. The contract is valid.

§ 231.
When
goods not in
seller's
possession.

This section does not seem very necessary; Cunningham and Shepherd⁴ suggest it was inserted to prevent any question of such a sale being a gambling transaction. But this seems far fetched.

The illustration is founded on *Hibblewhite v. McMorinc.*⁵

¹ See under "Election."

² Discussed in § 161.

³ See § 174 as to property in goods to be manufactured.

⁴ 10th Ed. 292.

⁵ (1839) 5 M. & W. 462., 2 Ry. & Canal C. 51, confirmed in *Mortimer v. McCallan*, (1840) 6 M. & W. 58, 55 R. R. 508; *Misri Lal v. Mozhar*, 13 C. 262.

The English rules say there may be a contract for the sale of goods, the acquisition of which by the seller depends upon a contingency which may or may not happen.¹

§ 231.

There may be a purchase of a chance, in which case the buyer must abide the consequences.² But the point is treated as doubtful by Chalmers.³ Though Martin, B., said "no doubt a man may buy a chance of obtaining goods"⁴ and Benjamin says the rule is correct in principle.⁵

§ 232.
Purchase of
a chance.

There was one case in which it was supposed at Common Law that future goods could be assigned. It was said a man could sell future goods that had a potential existence, and that then the legal property in them would pass to the buyer as soon as they came into existence. Goods were supposed to have a potential existence if they would naturally grow out of anything already owned by the seller, as wool that would grow on sheep.⁶ Chalmers considers the last cited case was overruled by *Langton v. Higgins*.⁷ Benjamin⁸ however considers that such potential goods can be assigned.

§ 233.
Future
goods with
potential
existence.

From the illustrations to section 87 it seems that in India a contract to sell such goods as future crops, is only an agreement to sell, and requires subsequent appropriation to pass the property.⁹

Where the price of goods sold is not fixed by the contract of sale, the buyer is bound to pay the seller such a price as the Court considers reasonable.

Section 89.
Determina-
tion of price
not fixed by
contract.¹ S. of G. Act s. 5 (2).

Hobart Reports 132; Benj. 4th Ed.

² *Hitchcock v. Giddings*, (1817)

82.

⁴ Price 185, 18 R. R. 725.⁷ (1859) 28 L.J. Ex.252(Contract to buy next crop of peppermint).³ 5th Ed. 19.⁴ *Buddle v. Green*, (1857) 27 L. J. Ex. p. 34.⁸ 4th Ed. 82, 83, citing *Robinson v. Macdonell*, (1816) 5 M. & S. 228.⁵ 4th Ed. 87, citing *Hanks v. Palling*, (1856) 25 L. J. Q. B. 375.⁹ As to present sales of future goods, see § 161.⁶ *Grantham v. Hawley*, (1603)

§ 233.

Illustration.

B living at Patna, orders of *A* a coachbuilder at Calcutta, a carriage of a particular description. Nothing is said by either as to the price. The order having been executed, and the price being in dispute between buyer and seller, the Court must decide what price it considers reasonable.

§ 234.
Price not
fixed.

Market price.

The principle is that if the parties have not arranged the price, the inference is that they are content to abide by the ordinary rates and to submit to the adjustment of them by the ordinary tribunals.¹ The intention of the parties must be deduced from their conduct. This is the English law.² The general rule is that the market price must be taken to be the agreed price, but this depends on circumstances.³ The English law is the same both as regards executed contract⁴ and executory contracts,⁵ *i.e.* whether the action is for the price of goods sold and delivered or for non-acceptance of goods agreed to be purchased.

Executory
contracts.

Presumably the rule will apply in India to agreements for sale or executory contracts; though the words of the section only apply in terms to sales, *i.e.* executed contracts, but the Code is not exhaustive, and the English Common Law will hold good.

Property
passes.

The words of the section imply that the property passes prior to the determination of the price.

When part only of the goods are accepted and the rest either property rejected or not tendered there is a substituted contract to pay the value of the goods, not to pay at the contract rate.⁶

¹ *Davies v. D.*, (1887) 86 Ch. D. 359.

² S. of G. Act 8, *Joyce v. Swan*, (1864) 17 C. B. N. S. 84.

³ *Acebal v. Levy*, (1834) 10 Bing. 376.

⁴ *Hoadly v. McLaine*, (1834) 10 Bing. 482.

⁵ *Valpy v. Gibson*, (1847) 4 C. B. 837, 864.

⁶ *Macfarlane v. Carr*, 8 B.L.R. 459, 17 W.R. 244.

CHAPTER X.

Sec. 90.]

DUTIES OF THE SELLER.

The duties of the seller under a contract of sale will next be considered. A man is bound to be ready and willing¹ to carry out his contract from the very earliest moment at which fulfilment can be demanded.² § 235.
Delivery.

Under the English Common Law³ after the contract of sale is complete, the chief and immediate duty of the seller in the absence of contrary stipulations is to deliver⁴ the goods to the buyer as soon as the latter has complied with the conditions precedent, if any, incumbent on him. Delivery.

The Sale of Goods Act enacts⁵ that "it is the duty of the seller to deliver the goods and of the buyer to accept and pay for them in accordance with the terms of the contract." The question as to what the seller is bound to tender is considered later.⁶

'Delivery' means, unless the contract or subject matter otherwise requires, a voluntary transfer of possession from one person to another.⁷ Meaning of
delivery.

Under the Contract Act the position is different, for by section 93, it is enacted that in the absence of any special promise, the seller of goods is not bound to deliver them until the buyer applies for delivery. Demand for
delivery.

Apart from this and the rules as to time and place of delivery there seems to be no difference between the principles which govern this subject in England and those which apply in India. Hence the ruling⁸ that questions of delivery must be decided with reference to the Contract Act and not to the English law, does not

¹ The meaning of the term is defined in *Cort v. Ambergale Ry.*, (1851) 17 Q.B. 127; 20 L.J. Q.B. 460; set out § 553.

² *Pandurang v. Dadabhoy*, (1902) 4 Bom. L.R. 453.

³ Benj. 4th Ed. 676.

⁴ As to the meaning see § 236 and how made § 272.

⁵ Section 27.

⁶ See § 285.

⁷ See s. 62 Sale of Goods Act.

⁸ *Buldeo Doss v. Howe*, (1880) 6 C. 64 A. C.

§ 235. mean much ; the more so as the Indian Law before the Act was as far as commercial matters are concerned substantially the English Common Law.

§ 236.
Meaning of
the term
delivery.

A certain amount of confusion arises about the meaning of the term delivery, because delivery which is effectual for one purpose is ineffectual for another.¹ The word may be used to signify the transfer of title or of possession.² When it is used to denote transfer of possession it is employed in two distinct classes of cases, one with reference to the formation of the contract, more especially in England with reference to the question of actual receipt under section 4 of the Code, and in India also under section 79 ; the other with reference to the performance of the contract, *i.e.* where the point is if the seller has performed his completed bargain by delivery of the bulk to the buyer.

§ 237.
Meaning of
possession.

In the latter case too, there is a fresh source of confusion in the different meanings attached to possession. For in a contract of sale for credit, the buyer is technically in possession, but on his insolvency before actual delivery the seller is said to have retained his possession. Again if the goods are delivered to a carrier, the seller loses his lien, but if he stops the goods in transit the goods are said to be in the constructive and not in the actual possession of the buyer. Delivery in the sense of a transfer of title has already been discussed. Delivery into the buyer's possession, sufficient to destroy the vendor's lien, or his right to stop in transit will be discussed *infra*.

§ 238.
Delivery in
perfor-
mance of
the
contract.

This lecture is confined to a consideration of the vendor's duty to deliver goods in performance of his contract so as to enable him to defend an action by the buyer for non-delivery.

Section 90 defines what is meant by delivery.

¹ Chalmers 2nd Ed. p. 109,

² Benj., 5th Ed. p. 677.

Delivery of goods sold may be made by doing anything which has the effect of putting them in the possession of the buyer, or of any person authorised to hold them on his behalf.

Section 90.
Delivery
how made.

Illustrations.

- (a) *A* sells to *B* a horse, and causes or permits it to be removed from *A*'s stables to *B*'s. The removal to *B*'s stable is a delivery.
- (b) *B* in England, orders 100 bales of cotton from *A*, a merchant of Bombay, and sends his own ship to Bombay for the cotton. The putting the cotton on board the ship is a delivery.
- (c) *A* sells to *B* certain specific goods which are locked up in a godown. *A* gives *B* the key of the godown in order that he may get the goods. This is a delivery.
- (d) *A* sells to *B* 5 specific casks of oil. The oil is in the warehouse of *A*. *B* sells the 5 casks to *C*. *A* receives warehouse rent for them from *C*. This amounts to a delivery of the oil to *C*, as it shows an assent on the part of *A* to hold the goods as warehouseman of *C*.
- (e) *A* sells to *B* 50 maunds of rice in possession of *C*, a warehouseman. *A* gives *B* an order to *C* to transfer the rice to *B*, *C* assents to such order and transfers the rice in his books to *B*. This is a delivery.
- (f) *A* agrees to sell *B* 5 tons of oil at Rs. 1,000 per ton, to be paid for on delivery. *A* gives to *C*, a wharfinger, at whose wharf he has 20 tons of oil, an order to transfer 5 of them to *B*. *C* makes the transfer in his books and gives *A*'s clerk a notice of the transfer for *B*. *A*'s clerk takes the transfer to *B* and offers to give it him on payment of the price of the oil. *B* refuses to pay. There has been no delivery to *B*, as *B* never assented to *C* his agent to hold the 5 tons selected by *A*.

§ 238.
Voluntary.

There must be a voluntary transfer of possession¹ and delivery by mistake may be inoperative and delivery may be conditional.²

Payment
concurrent
condition.

§ 239.
Credit.

Generally the seller after a complete sale must on the buyer's demand deliver the goods. But there may be conditions precedent stipulated for in the contract. If nothing is said about payment it is presumed that delivery and payment are concurrent conditions.³

Lien.

If credit is given, the effect is an actual transfer of the right to possession by the bargain, and the buyer is considered for all purposes, save that of the vendor's lien for the price or right to stop to be in possession: for the property of personal chattels draws to it the possession.⁴ But though the buyer has a right to possession, the vendor may refuse to part with the goods and exercise his lien to secure payment if no credit is given, or if credit is given if the buyer's acceptances are dishonored⁵ or if he becomes insolvent before obtaining actual possession,⁶ or if after the time of credit has expired, possession is still with the seller.

§ 240.
Effect of
the buyer's
insolvency.

The effect of insolvency is not to rescind the contract, but it puts an end to any credit given, and the insolvent, if the seller is in possession or has stopped the goods, can only obtain the goods on tendering the price, but if he can obtain possession while the goods are in transit before they are stopped, he has the right to do so.

¹ S. of G. Act, s. 62; *Godts v. man*, (1883) 49 L. T. N. S. 478.

Rose, (1854) 17. C. B. 229; Pollock on 'Possession' p. 100-114. ⁴ 2 Wms. Saund, 47 n. 1., Benjamin 4th Ed p. 679. But this is

² See *G. I. P. v. Hanmandas*, not possession under s. 108 ex 3 (1889) 14 B. 57. or 1.

³ Benjamin 5th Ed. p. 678, S. cf ⁵ *Kuttayan v. Palaniappa*, (1903) 27 M. 540.

G. Act., s. 28. For a case where the course pursued under the contract showed that a sale on credit was intended, see *King v. Reed-* ⁶ *Bloxam v. Sanders*, (1825) 4 B. & C. 941, and see sections 95, 96, 97, Contract Act.

Although the buyer's insolvency does not *per se* put an end to the contract, yet if there is long delay after notice of an intention from the other party to end the contract it will be considered as abandoned¹; and if the buyer gives the seller such a notice of his insolvency as amounts to a declaration of his inability or unwillingness to pay for the goods the seller is justified in treating the notice as a repudiation of the contract,² and after the lapse of a reasonable time to allow the buyer's trustee³ and also, it seems, a sub-buyer⁴ from the insolvent to elect to complete the contract by paying the price in cash, may without tendering the goods to the trustee consider the contract broken and prove against the insolvent's estate for damages.⁵

§ 240.

The trustee cannot adopt an instalment contract and claim further deliveries under it without paying for previous deliveries,⁶ even if under the contract credit was given the time of which had not expired,⁶ for insolvency ends all forms of credit.

In a contract for goods sold by description which are not specific, the seller is at liberty to supply goods corresponding to the description; in order to fulfil their contract they are bound to give or tender to the buyer the property in and the possession, actual or constructive, of goods specified and identified.⁷

§ 241.
Delivery of unascertained goods.

In some cases there is no need of actual delivery as where the goods are ponderous and incapable of being

§ 242.
Delivery may be symbolic or constructive.

¹ *Bloomer v. Bernstein*, (1874) (1879) 10 Ch. D. 586 C. A. 43 L. J. C. P. 375.

² *Re Phoenix*, (1876) 4 Ch. D. 108 C. A.; *Morgan v. Bain*, (1875) L. R. 10 C. P. 15, mere notice is not sufficient; *Mess v. Duffers*, (1901) 6 Com. Cas. 165.

³ *Jaffer Meher Ali v. Budge* Ch. 289.

Budge Jute Mills, (1907) 34 C. 289.

⁴ Per Cur. in *Ex parte Stapleton*, M. 38 O. C.

⁵ *Ex parte Chalmers*, (1878) 8 Ch. 289, 294; *Ex parte Stapleton*, (1879) 10 Ch. D. 586 C. A.; *Morgan v. Bain*, (1874) L. R. 10 C. P. 15, 25.

⁶ *Ex parte Chalmers*, (1873) 8 Ch. 289.

⁷ *J. C. Shaw v. Bill*, (1884) 8 M. 38 O. C.

§ 242. handed over from one to another. Then delivery may be effected by that which is tantamount to giving possession as by symbolical delivery, and this divests the seller's lien.

Symbolic. Delivery is said to be symbolic when it is effected by delivery of the key of the place where the goods are or by the delivery of other indicia of property.¹ Merely telling a buyer that the key is at his disposal is a mere license and does not effect delivery unless the authority is acted on.² And the delivery of the key to be effective must give complete access to the goods.³

§ 243. Delivery by transfer of bill of lading. Delivery by a transfer of a bill of lading is an instance of symbolic delivery. For delivery of goods at sea may be quite a different thing from delivery of goods on shore.⁴ For in the case of a bill of lading the property passes on its transfer and no consent of the carrier in possession is required.⁵ This exception is based on the reason that the goods being as a rule at sea, the bailee's consent cannot be obtained, and accordingly it was the custom of merchants to treat the assignment of a bill of lading as a transfer of the property in and possession of the goods.⁶

When transfer sufficient.

The endorsement and transfer of a proper bill of lading to the buyer, while the goods are at sea, amounts to delivery in performance so as to defeat an action for non-delivery.⁷ And in the absence of a contractual obligation to the opposite effect a buyer is bound to accept a bill of lading as delivery, though the general rule is inspected

¹ *Ward v. Turner*, (1751) 2 L. J. C. P. 277.

Ves. Sr. 431; *Chaplin v. Rogers*, (1861) 1 East. p. 195; *Ellis v. Hunt*, (1789) 3 T. R. 464. Contract Act, s. 90 illus. (c); *Gough v. Everard*, (1863) 2 H. & C. 1 (key of a wharf).

² Pollock Indian Contract Act 2nd Ed. 378.

³ *Milgate v. Kebble*, (1841) 3 Man. & Gr. 100, 60 R. R. 475, 10

⁴ *Clemens v. Biddell*, (1911) 28 T. L. R. 42 H. L.

⁵ Act IX of 1856.

⁶ See *Sanders v. Maclean*, (1883) 11 Q. B. D. p. 341.

⁷ *Salter v. Woollams*, (1841) 2 M. & G. 650; *Wood v. Manley*, (1840) 11 A. & E. 34; *Sanders v. Maclean*, (1883) 11 Q. B. D. 327.

delivery against inspected payment,¹ and a tender thereof is good before the goods are landed and examined by the buyer and before the ship has arrived.¹ But a tender of a bill of lading relating to goods subject to charges or liens would be insufficient² unless the seller has used all reasonable despatch,³ for a seller makes a good tender of delivery by the transfer of a bill of lading where the bargain is for such symbolic delivery if he forward it to the buyer as soon as he reasonably can after shipment;⁴ there is no condition that it must be delivered before the ship arrives or charges are incurred.⁵ The bill of lading must be duly endorsed and effectual⁵ to pass the property in the goods, and must not only purport to,⁶ but actually⁷ represent goods in accordance with the contract. Even if the contract is for payment against shipping documents, a tender of the goods is valid even if the bill of lading is not then forthcoming.⁸

§ 243.

Subject to charges.

Duly endorsed.

Must represent correct goods.

Delivery of two copies of a bill of lading, the third being outstanding and unaccounted for, but not having been dealt with, is a good tender,⁹ for that is the practice of merchants.¹⁰ The buyer is bound to accept one duly

Where one of set unaccounted for.

¹ *Biddell v. Clemens*, (1911) 28 T.L.R. 42 reserving (1911) 2 K.B. 984 C.A.

² *Motichund v. Sreekissen*, (1900) 4 C.W.N. 313 C.A. and see § 277 where the seller agrees to pay freight and does not do so, such payment is a condition precedent and a tender of the bill of lading until that is paid is invalid: Benj. 5th Ed. 471.

³ *Sanders v. Maclean*, (1883) 11 Q.B.D. 327.

⁴ Without reference to the time of unloading, *Barber v. Taylor*, (1839) 5 M. & W. 527.

⁵ A bill of lading usually represents the goods after being

landed at the London wharves until replaced by a wharfinger's warrant, *Barber v. Meyerstein*, (1870) L. R. 4 H. L. 317, 39 L. J. C.P. 187, but see § 422.

⁶ *Re Keighley*, (1894) 70 L.T. 155 C.A.; *Re Salomon*, (1899) 81 L.T. 325 (altered documents—perfect documents) *Tanvaco v. Lucas*, (1859) 28 L. J. Q. B. 150.

⁷ *Tanvaco v. Lucas*, (1859) 28 L. J. Q. B. 301.

⁸ *Borrowman v. Free*, (1879) 4 Q.B.D. 500.

⁹ *Sanders v. Maclean*, (1883) 52 L. J. Q. B. 481 C.A.

¹⁰ *Glyn v. E. & W. India Dock*, (1882) 7 Ap. Ca. 591.

§ 243. endorsed bill ; if another has been dealt with previously, the tender is bad, but the buyer refusing to accept a bill does so at his own risk.¹ If another bill is subsequently dealt with, that does not affect the passing of the property under the first bill,² but the holder of the first bill can only sue any person in possession of the goods, and not the captain or other bailee who has innocently delivered the goods under a subsequently endorsed bill,³ for a bill of lading is the receipt given by the captain for the goods⁴ and he is entitled to act according to it ; but if he has notice or knowledge of rival claims he delivers at his peril.⁵ Where the contract is for a sale of a specific cargo as per bill of lading there is it seems no representation that the cargo was shipped at the date of the bill of lading.⁶

Effect of
dealing with
two of set.

Date on bill.

§ 244.
Constructive
delivery.

Delivery is constructive when it is effected without any change in the actual possession as in the case of delivery by attornment or symbolic delivery.

Delivery by attornment may take place in three classes of cases. First, the seller may be in possession of the goods, but after sale he may attorn to the buyer, and continue to hold the goods as his bailee. Secondly, the goods may be in the possession of the buyer before sale, but after sale he may hold them on his own account. Thirdly, the goods may be in possession of a third person as bailee for a seller. After sale such a third person may attorn to the buyer and continue to hold the goods as his bailee. But the presumption is against there being constructive delivery as it deprives the seller of his lien.⁶

In the first case the seller may agree⁷ to change the character of his possession and to continue to hold as a

¹ *Sanders v. Maclean*, (1883) 52 L. J. Q. B. 481 C. A.

² *Barber v. Meyerstein*, (1870) L.R. 4 H.L. 317.

³ *Glyn, v. E. & W. Indian Dock*, (1882) 7 Ap. Ca. 591.

⁴ *Leduc v. Ward*, (1888) 20

Q.B.D. p. 480, 57 L.J.Q.B. p. 381.

⁵ *Gallorno v. Adams*, (1862) 12 C. B. N. S. 560.

⁶ *Dole v. Stimpson*, 21 Pick. 384 (American).

⁷ *Cusack v. Robinson*, (1861) 30 L.J.Q.B. 261.

bailee for reward,¹ or as a gratuitous borrower.² The seller's assent must be proved, it will not be presumed.³

§ 245.
Where
seller in
possession.

The question is very thoroughly discussed in *Castle v. Swooner*,⁴ where goods were sold at six months credit, and transferred to the buyer's name in the seller's bonded warehouse, and an invoice sent to the buyer stated the goods were warehoused for 6 months. It was held that by keeping the invoice the buyer assented to the seller being his agent or bailee or at any rate by a request to the seller to resell for him. Naturally there can be no delivery actual or constructive without the buyer's assent.

Assent by the unpaid seller to become the buyer's bailee is not probable as the seller thereby loses his lien,⁵ and strong evidence is required. Where the seller sent goods to be engraved with buyer's arms, paying the engraver himself and instructing him to return the goods to himself,⁶ and where cigars sold were packed in the buyer's own boxes,⁷ it was held there was no delivery. But where there is a sub-buyer an agreement on the part of the seller to be the sub-buyer's bailee may be proved by comparatively slight evidence.⁸ If the seller allows the sub-purchaser to take away part of the goods, there is delivery to the purchaser.⁹ But there is a distinction between cases where the goods are ascertained and where they are not.¹⁰

Where no
sub-buyer.

Seller in
possession.

¹ *Elmore v. Stone*, (1809) 1 Taunt. 458; *Beaumont v. Brengeri* (1847) 5. C.B. 301.

² *Marvin v. Wallis*, (1856) 6 E. & B. 726, 25 L.J.Q.B. 369.

³ *Re Roberts*, (1887) 36 Ch. D. 196.

⁴ (1861) 29 L.J. Ex. 235, 5 H. & N. 281. In appeal 30 L.J. Ex. 310, 6 H. & N. 828. (A case of acceptance under the Statute of Frauds.)

⁵ See § 349.

⁶ *Owenson v. Morse*, (1796) 7 T. R. 64.

⁷ *Boulter v. Arnott*, (1828) 1 Cr. & Mee. 333 and for other cases see under 'Loss of Lien.'

⁸ *Stoveld v. Hughes*, (1811) 14 East. 308.

⁹ *Chaplin v. Rogers*, (1801) 1 East. 192, approved in *Marshall v. Green*, (1876) 1 C.P.D. p. 41.

¹⁰ *Mordaunt v. British Oil Co.*, (1910) 2 K.B. 502, set out § 354.

§ 245.
Payment of
warehouse
rent by
buyer.

The payment of warehouse rent to the seller by the buyer does not amount to a constructive delivery, though it might do so if the warehouseman was a third person,¹ or if a sub-buyer pays the seller rent.²

Test loss of
lien.

Seller must
assent
permissive
possession.

Most of the English cases are decisions on what is actual receipt under the Statute of Frauds, but apart from the fact that the actual removal by the buyer of part however small of the things sold if taken as part of the bulk and by virtue of his purchase, is sufficient receipt under the statute; the same principles determine what amounts to assent sufficient to constitute the seller in possession the buyer's bailee and thus deprive him of his lien and constitute delivery in performance of the contract. For receipt under the Statute of Frauds implies delivery.³ One test as to whether there has been delivery although the seller remains in possession is to enquire whether he has lost his lien for the price⁴ at Common Law.⁵ As long as the seller has not assented to change his character, and can refuse delivery unless payment is made, the fact that he allows the buyer temporary use of the thing sold⁶ or arranges for its keep under the buyer's directions,⁷ does not constitute a loss of lien or delivery. The question of a seller's lien when he holds as bailee for the buyer is discussed under lien.

§ 246.
Goods in
buyer's
possession.

The second case is simple, and it would require strong evidence to show that the buyer's possession was not on his own account after sale. For as a rule the fact of the sale operates as a delivery of possession in such cases⁸;

¹ *Miles v. Gorton*, (1834) 2 C. & M. 504; *Grice v. Richardson*, (1877) 3 A. C. 319 P.C.

² Section 90, illustration (d).

³ *Saunders v. Topp*, (1849) 4 Ex. 390.

⁴ *Baldev v. Parker*, (1823) 2 B. & C. 37, 44.

⁵ See now S. of G. Act. s. 41

(2) and see § 330 as to Lien by Contract.

⁶ *Tempest v. Fitzgerald*, (1820) 3 B. & Ald. 680.

⁷ *Carter v. Toussaint*, (1822) 5 B. & Ald. 855.

⁸ There is no need of any evidence as under the Statute of Frauds: see *Lillywhite v. Devereux*, (1846) 15 M. & W. 285.

the parties may however agree otherwise.¹ Pollock however considers that unambiguous evidence must be given, but cites the case of an agent buying his principal's goods² where evidence was required under the Statute of Frauds.

The third case is the most frequent. All three parties must concur.³ This was clearly established at Common Law and is provided for by the Sale of Goods Act.⁴

§ 247.
Attornment
by a third
party.

If the agent or depository is not in actual possession there can be no constructive possession through him. Even if he attorns to the buyer and is estopped as against him from denying possession, that will not amount to delivery by the seller to the buyer.⁵ Where the seller gives the buyer a document of title it must be noted that unless there are goods on which the document of title can operate it has no effect either to pass the property or the constructive possession.⁶ And apart from questions of estoppel the goods referred to must be ascertained.⁷ An actual receipt of the goods takes place when the seller, the buyer and the bailee agree that the bailee shall hold the goods for the buyer. The goods were in the possession of an agent for the seller and therefore in contemplation of the law in possession of the seller himself and they become in the possession of an agent of the buyer, and therefore in that of the buyer himself.⁸ But all the parties must join in the agreement, for the agent of the seller cannot be converted into the agent for the buyer without his knowledge and consent.⁹ Even if the seller

Bailee must
have actual
possession.

Three
parties
must agree.

¹ Benjamin, 4th Ed. 812, 5th Ed. 839.

² *Edan v. Dudfield*, (1841) 1 Q. B. 302, 55 R.R. 258.

³ Section 90, (Illustration) b.

⁴ Section 29 (3).

⁵ *McEwan v. Smith*, (1849) 2 H. L. C. 309; *J. C. Shaw v. Bill*, (1884) 8 M. 38 O. C.

⁶ *Bryans v. Nix*, (1826) 4 M. & W. 775; *J. C. Shaw v. Bill*, (1884) 8 M. 38.

⁷ *Anglo-India Jute Mills v. Omademull*, (1911) 83 C. 127 C.A.

⁸ Benj. 5th. Ed. 216; Blackburn 28 2nd Ed. 25.

⁹ *Bentall v. Burn*, (1824) 3 B. & C. 423; *Bill v. Bament*, (1841) 9 M. & W. 36; *Woodley v. Coventry*, (1863) 32 L. J. Ex. 185.

§ 247.
Attornment
by third
party (con.)

informs the bailee of a sub-sale, there must be attornment by him.¹ So at Common Law apart from the Factors Acts if the goods are in the possession of a warehouseman, a wharfinger, a carrier or any other bailee, the seller's order given to the buyer directing the bailee to deliver the goods or to hold them for the buyer, will not effect a change of possession unless the bailee accepts the order or recognises it or consents to act in accordance with it.² Until then, the bailee remains the seller's agent and bailee. The transfer of a warrant to the buyer, issued by the bailee himself, is of the same effect;³ even if the bailee is a dock company bound by law to transfer goods from the seller to the buyer when required to do so, his consent is necessary to constitute delivery.⁴

It was held in *Eagleton v. E. I. R.*⁵ that where the plaintiff had accepted bills on the security of a railway receipt in which it was stated the goods would be delivered to the person or his order, he became, on the Railway Company promising to deliver to him, entitled to demand possession from them, and that the authority to receive given to him could not be revoked by the consignor.

§ 248.
When an
unaccepted
order
affords
defence to
suit for
non-
delivery.
Delay in pre-
senting.

But although an order on a third person who might or might not think fit to execute it does not of itself constitute delivery⁶ yet it may amount to delivery in performance if the buyer unnecessarily delays in presenting it and a former seller is in consequence enabled to stop the goods in transit,⁷ or if the buyer refuses to present it.⁸

¹ *Poulton v. Anglo-American Oil Co.*, (1911) 27 T.L.R. 216 C.A. B. & C. 423.

⁵ (1872) 8 B. L. R. 581.

² See *Cooper v. Bill*, (1865) 34 L. J. Ex. 161.

⁶ *J. C. Shaw v. Bill*, (1884) 8 M. 38.

³ *Farena v. Home*, (1846) 16 M. & W. 119; see Lecture on Documents of Title."

⁷ *Buddle v. Green*, (1857) 27 L. J. Ex. 83.

⁸ *Bartlett v. Holmes*, (1853) 18

⁴ *Bentall v. Burn*, (1824) 3 C. B. 630.

But even if the contract provides that the buyers shall take an unaccepted delivery order, there is an implied term that the order when duly presented will be accepted and acted upon by the person to whom it is addressed.¹

§ 248.

Contract for unaccepted order.

The position in India as regards documents of title other than a bill of lading,² is not clear. Illustration (b) to section 90 shows that an order on a warehouseman given to a buyer requires the bailee's assent before there is delivery. Sargent, C. J.³, held that the Contract Act "gives no larger effect, except by section 108, to a delivery order than it had by English Common Law. Section 90 illustration (e) read with sections 95 and 98 shows that the giving of a delivery order does not of itself give the vendee such a possession as to defeat the vendor's lien." The learned Judge proceeded to hold that a purchaser is not within section 108.⁴ Whether section 108, exception 1, includes the case of a buyer in possession of documents of title, or not, it does not affect the question of whether the mere giving of a delivery order or other document of title, not being a bill of lading, to a buyer deprives the seller of his lien or constitutes delivery to the buyer, for that section only gives a person in possession the power to give a good title to a *bona fide* purchaser, and does not give such a person a good title in himself which is essential to constitute delivery. [And sections 102 and 103 show that the fact of the buyer being in possession of documents showing title to goods does not of itself affect the seller's right to stop.] It seems clear then that at least until the buyer transfers the document of title, there must be attornment to constitute delivery.⁵ As

§ 249.
Transfer of documents of title.

¹ *Ramdeo v. Cassim Mamoojee*, (1888) 8 M. 38.
(1898) 21 C. 173.

⁴ As to this point see § 477.

² For effect of the transfer of bills of lading see § 243.

⁵ See *Eagleton v. E.I.R.*, (1872) 8 B. L. R. 581; *Le Geyt v. Harvey*, (1884) 8 B. 501.

³ *LeGeyt v. Harvey*, (1884) 8 B. 501 C. A., see *J. C. Shaw v. Bill*,

§ 249. regards the case of a transfer of such documents to a sub-buyer *see* under section 108.

Documents
must be
given up.

All such documents must be delivered up¹ before the goods need be delivered, otherwise the bailee might render himself liable if an accepted delivery order or the like were subsequently² or previously³ transferred to a *bona fide* holder for value. It seems clear that any demand for delivery under a document of title can be disregarded unless the document is produced and given up, and if it is alleged to be lost the possessor of the goods may generally demand an indemnity before delivery; for though no document of title relating to goods is negotiable so as to confer a good title on a *bona fide* holder for value, the possessor is entitled to be satisfied that he will not render himself liable to third parties to whom the documents may have been or may be assigned by the true owner or one holding them with his consent.

§ 250.
Where
bailee
gives
previous
assent.

The cases⁴ which establish that there is no delivery when the goods are in the possession of a third party unless that third party assent to attorn to the buyer and become his bailee must be distinguished from cases where a third party has agreed previously to the sale to become bailee; for any purchaser such assent is irrevocable after sale and the giving of delivery order on him is delivery.⁵ But the editors of Benjamin⁶ consider this distinction unsound, for it cannot be reconciled with the principle that the necessity of an attornment by the bailee is not taken away by the fact that he issued a warrant for the goods, though it may be in terms transferable;⁷ and they add that if there be prior attornment in the case of a

Previous
assent of
bailee.

¹ If required, *Hathesing v. Laing*, 17 Eq. 92.

² *Bristol and West of Eng. Bk. v. M. Ry.*, (1891) 2 Q. R. 653.

³ *London and County Bk. v. Fulford*, (1886) 2 T. L. R. 703.

⁴ *Bentall v. Burn*, (1824) 3 B. & C. 423; Benj. 4th Ed. p. 161.

⁵ *Salter v. Woollams*, (1841) 2 M. & G. 650; *Wood v. Manley*, (1840) 11 A. & E. 34.

⁶ 5th Ed. p. 693.

⁷ *Farena v. Home*, (1846) 16 M. & W. 119; *Thol v. Hinton*, (1855) 4 W. R. (Eng.) 26.

license, why not in a transferable warrant? They accordingly submit that *Salter v. Woollams*¹ is no authority, that ordinarily the seller performs his duty by previously obtaining a prospective attornment by the bailee to the buyer, and that in that case there was a special agreement to that effect.

When a person accepts a delivery order he is prevented from denying as against the holder of the order, that he has possession of the goods either as being estopped or by having attorned.² This is so in the case of a holder of goods or other person in possession of them and also of a person who has no possession at all.³ But even if such attornment discharges⁴ the person estopped as regards the drawer of the delivery order, it does not, without a contract to that effect, release the seller from his liability to supply the goods to the buyer on the third party's default.⁵ There must be to effect that an agreement amounting to novation.³

§ 251.
Effect of
accepting
a delivery
order.

When the buyer acts on a representation of the seller that the third party has the goods which is incorrect, the seller cannot say that he is discharged first because the representation was the basis of the contract in the

Where
there are no
goods.

¹ (1841) 2 M. & G. 650.

² See § 357.

³ *J. C. Shaw v. Bill*, (1884) 8 M. 38; *Knights v. Wiffin*, (1870) L.R. 5 Q.B. 660; see also under Lien, and for cases in which a bailee may set up a *jus tertii*, *Biddle v. Bond*, (1865) 6 B. & S. 225; *Rogers v. Lambert*, (1891) 1 Q.B. 318, but this only applies as against his bailor, not against a third party to whom he has attorned.

⁴ Benjamin, 5th Edition, 864, favours the view that bailees making themselves responsible to buyers or sub-buyers by attornment do not relieve themselves

of liability towards the unpaid seller. But if the responsibility is incurred by accepting the unpaid seller's delivery order, or by otherwise acting at his request, it seems that the bailee could recover from the seller any loss thereby incurred by him, as being his agent or acting at his request. Of course if a bailee attorns to a buyer or sub-buyer without the unpaid seller's authority, he does so at his own risk.

⁵ For such a contract see *Salter v. Williams*, (1841) 10 L.J. C. P. 145, cf. *Smith v. Chance*, (1819) 2 B. & Ald. 753.

delivery order, though made under a mistake by the seller, secondly because there was a mutual mistake and the contract is voidable.¹

§ 252.
Bailee
must act as
authorised.

Where
absolute
authority to
deliver.

When the question is, has the bailee assented² to become the bailee of the buyer so as to constitute delivery and to end the seller's right to revoke the authority given to the buyer to receive the goods, whether that authority is in writing or not, there is a difference between an absolute authority to take possession, and one that is conditional. When the authority is absolute nothing further is requisite to give the buyer possession than the assent of the bailee to hold them on his account, and such assent need not be evidenced by any formal act. It is generally shown by a formal transfer on the bailee's books³ but it is as effectual if expressed verbally or perhaps if implied by silence in circumstances indicative of assent.⁴ But if the bailee is an unpaid seller of the goods his assent to hold for the buyer is more readily to be inferred if the goods are specific than if they are unascertained. Such a bailee may acknowledge the right of the sale purchaser to have the goods subject to his own right to be paid for them, *i.e.*, subject to his own lien.⁵ The view taken in a recent case was that assent to hold for the buyer is a question of fact, and an entry in his books of the buyer's name is not conclusive even in the case of specific goods.⁵ The bailee may merely note the assignment in his books. Apparently as long as the bailee retains his lien there has been no delivery, for it is not a performance of a contract unless so agreed to tender goods subject to charges.

¹ *Shaw v. Bill*, (1884) 8 M. 38, citing *Behn v. Burness*, (1863) 3 B. & S. 751.

² See further para. 354 as to a seller's assent to a sub-sale; the same principles apply to all attornments.

³ *Pearson v. Dawson*, (1858) 27

L.J. Q. B. 248.

⁴ Blackburn 2nd Ed. 344, 8rd Ed. 372; *Harman v. Anderson*, (1809) 2 Camp. 243; *Lucas v. Dorrien*, (1817) 7 Taunt. 278.

⁵ *Mordaunt v. Bristol Oil Co.*, (1910) 2 K. B. 502 set out *infra*.

But if the bailee is a carrier, the fact that he retains his lien for carriage is not conclusive of the question whether there has been delivery. The point is discussed under "Stoppage in transit." § 252.

The payment of rent is evidence to show on whose account the goods are held¹ and when the bailee has notice of the seller's order, it is pretty clear that mere silence is evidence of acquiescence, and even an express refusal, if wrongful, might not preserve the seller's rights; but probably it would.² Payment of rent.

If the authority to give possession is conditional³ the position is somewhat different. The bailee has no authority to deliver or the buyer to receive until the condition is fulfilled⁴ and the seller is still entitled, if other circumstance permit, to revoke the authority to deliver,⁴ and Blackburn considered that even actual delivery by the bailee before the condition was fulfilled would not affect the seller.⁵ Where conditional. Actual delivery.

But the condition according to Blackburn must be authorised by the contract, for the seller cannot clog an absolute authority to receive given by the contract by any condition on a delivery order or otherwise.⁵ § 253. Condition must be within the contract.

¹ *Harman v. Anderson*, (1809) 2 Camp. 243.

² Blackburn 2nd. Ed. 346; 3rd, 373; see *Lackington v. Atherton*, (1844) 13 L.J.C.P. 140, where the refusal was not wrongful; *Tanner v. Scovill*, (1845) 14 L. J. Ex. 321.

³ S. of G. Act s. 19 (1).

⁴ *Hanson v. Meyer*, (1805) 6 East 614; *Wallace v. Breeds*, (1811) 13 East. 522; *Busk v. Davis*, (1814) 2 M. & S. 397; *Shipley v. Davis*, 5 Taunt. 617; *Goodall v. Skelton*, (1794) 2 H. B. 316; *Loeschman v. Williams*, (1815) 4 Camp. 181 (payment in cash); *Bothlink v.*

Schneider, 3 Esp. 58 (giving security); *Hanson v. Meyer*, (1805) 6 East. 614, 8 R. R. 572 (weighing) *Winks v. Hassall*, (1829) 9 B. & C. 372 (condition to pay duty,) but a delivery order addressed to excise authorities asking them to receive duty does not render the order conditional on payment of duty, *Haig v. Wallace*, 2 Ir. L. R. N. S. 11. For a condition held not binding see *Swanwick v. Sothern*, (1839) 9 A. & E. 895.

⁵ Blackburn, 2nd Ed., 348; 3rd Ed. 375; *Godts v. Rose*, (1854) 25 L. J. C. P. 61; see S of G. Act, s. 19.

§ 253.
Authority
to deliver.

To establish this point Blackburn contrasts *Hanson v. Meyer*, and cases following it,¹ where the necessity for weighing the goods was by the contract a condition precedent to delivery, and the bailees had no authority to deliver nor had the buyer been authorised to take the goods until that was done, with *Swanwick v. Sothorn*² where the order to deliver was, according to Blackburn, conditional on the goods being weighed, but the contract was for a bin of oats, and the weighing was no part of the contract: and the condition in the order was not binding on the buyer, and he chose to waive it. *Godts v. Rose*,³ is explained on the ground that by the contract the seller could demand payment before delivery. The proposition is supported by *Spartali v. Benecke*,⁴ where the sellers having given credit were held not to be entitled to demand payment before delivery.

Under section 19 of the Sale of Goods Act the seller may, whether the goods are specific or not, make the appropriation conditional, though it seems that in that section the words 'contract' and 'appropriation' should be read as referring to specific goods and "subsequently appropriated" respectively. The reason seems to be that once the property has passed, the seller cannot clog the buyer's right to possession by any condition save as provided by the contract.

§ 254.
Right of the
seller to
revoke
authority
to take
delivery.

In cases where the seller has given the buyer authority to obtain delivery from the bailee of goods sold, the authority may be transferred by the buyer, and so long as there continues to be a consideration to the seller for granting the authority, it cannot be revoked by the

¹ *Wallace v. Breeds*, (1811) 13 East. 522; *Busk v. Davis*, (1814) 2 M. & S. 397; *Shipley v. Davis*, 5 Taunt. 617.

² (1855) 25 L. J. C. P. 61.

⁴ (1850) 10 C. B. 212, 19 L. J. C. P. 293; see under reservation of *jus disponendi*.

³ (1839) 9 A. & E. 895.

seller.¹ But if after giving the authority, the seller becomes entitled to refuse delivery, that is, if the consideration fails, he may revoke the authority if it has not been executed, but not if it has,² that is to say, if the bailee has not delivered the goods to, or attorned to the buyer or sub-buyer, the seller may, on the insolvency of the buyer, or on the expiration of any credit given to him, countermand the authority. A sub-sale to a *bonâ fide* buyer who has paid for the goods, made no difference at Common Law,³ unless the authority was executed, or the seller has assented the sub-sale.⁴

§ 254.

If the goods are in the possession of a third party who is not the seller's bailee, as timber lying at the disposal of the seller on the land of the person from whom he bought it, or lying at his disposal at a free wharf, delivery may be effected by the seller putting the goods at the disposal of the buyer and suffering him to take actual control of them.⁵

§ 255.
Delivery where third party is not the seller's bailee.

There are special Acts in England as to delivery at Legal Quays in London or at sufferance wharves.⁶

256.
Delivery at legal quays.

Delivery may also be made by giving actual possession of the goods to a carrier or wharfinger.

¹ *Coryton v. Lethebye*, 2 Will. Saund. 365; as to the irrevocable nature of a license see *Wood v. Manley*, (1840) 11 A. & E. 34; *Wood v. Leadbitter*, (1845) 13 M. & W. 838; *Taplin v. Florence*, (1851) 10 C. B. 744; for the right of action if revoked see *Kerrison v. Smith*, (1897) 2 Q. B. 445.

² *Eagleton v. E. I. R.*, (1872) 8 B. L. R. 581; *Hawes v. Watson*, 26 R. R. 448; the same rule applies to a delivery order obtained by fraud: *Babcock v. Lawson*, 49 L. J. Q. B. 408 C. A.

³ But for effect under the Code of Transfers of Documents of Title see s. 108.

⁴ *Dixon v. Yates*, (1833) 5 B. & Ad. 313.

⁵ *Tansley v. Turner*, (1835) 2 Bing. N. C. 151; *Cooper v. Eell*, (1865) 34 L. J. Ex. 161; see *Marshall v. Green*, (1875) 1 C.P.D. 35.

⁶ See Benj. 5th Ed. pp. 848, 852, and as to the Bombay Docks see *Lilladhar v. Wreford*, (1892) 17 B. 62.

Section 91.
Effect of
delivery to
wharfinger
or carrier.

A delivery to wharfinger of carrier of the goods sold has the same effect as a delivery to the buyer, but does not render the buyer liable for the price of goods which do not reach him, unless the delivery is so made as to enable him to hold the wharfinger or carrier responsible for the safe custody or delivery of the goods.

Illustration.

B, at Agra, orders of *A*, at Calcutta, three casks of oil to be sent him by railway. *A* takes three casks of oil directed to *B*, to the railway, and leaves them there without conforming to the rules which must be complied with in order to render the railway company responsible for their safety. The goods do not reach *B*. There has not been a sufficient delivery to charge *B* in a suit for the price.

§ 257.
Delivery to
carrier.

This section must clearly be read as subject to a contrary intention. When the seller delivers to a carrier but reserves his *jus disponendi*, there has at most been but a conditional appropriation of the goods to the contract; and clearly such delivery has not the same effect as delivery to the buyer.

It is also subject to sections 99 and 100 as regards the right to stop in transit. The English rule¹ is that where in pursuance of a contract of sale the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is *primâ facie* deemed to be delivery of the goods to the buyer.

Reserving
right of
control.

At Common Law such delivery was delivery to the buyer, but the presumption could be rebutted; thus the seller may reserve the right of disposal, as by taking a bill of lading in his own or in another person's name, in which case the delivery is not to the buyer, but to the person indicated on the bill of lading²

¹ S. of G. Act s. 82.

L. R. 10 Ex. 274; *Waite v. Baker*,

² *Gabarron v. Krcfft*, (1875) (1848) 2 Ex. 1., *see* §199.

The proviso must obviously be read subject to the agreement of the parties. The English rule is an instance of how such a section should be drafted. Section 32 (2) reads "unless otherwise authorised by the buyer, the seller must make such a contract with the carrier on behalf of the buyer as may be reasonable,¹ having regard to the nature of the goods and the other circumstances of the case. If the seller omits to do so and the goods are lost or damaged in the course of transit the buyer may decline to treat the delivery to the carrier as delivery to himself, or may hold the seller responsible for damages. Unless otherwise agreed when goods are sent by the seller to the buyer by a route involving sea transit, under circumstances on which it is usual to insure, the seller must give such notice to the buyer as may enable him to ensure them during that sea transit, and if the seller fails to do so the goods shall be deemed to be at his risk during such sea transit.

§ 258.
Responsi-
bility of
carrier.

The Indian provision is absurd ; for, according to mercantile practice it is generally impossible to make a sea carrier responsible for anything under a bill of lading. The section makes the seller ensure the goods with the carrier, who may or may not be willing to do so. Doubtless the courts will be ready to hold that any usual method of protecting the buyer's interests is impliedly authorised by the contract to the exclusion of the rule in the section.

The liabilities of carriers have been limited, unless the requirements of Act IX of 1890, sections 72, 73, are complied with in the case of railway companies, and of Act III of 1895, section 3, in the case of common carriers ; and a failure to comply with these will render the seller liable for goods that do not reach the buyer.²

Liability of
carriers.

¹ *Buckman v. Levi*, (1813) 3 14 East. 475, 18 R. R. 283 (failure to give notice of value), *Cithay* Camp. 414.

² See *Clarke v. Hutchins*, (1811) v. *Tate*, 3 Camp. 129.

§ 259.
Seller must deliver goods to a carrier in a merchantable condition.

The vendor's duty to deliver the goods to a carrier (if this is necessary) in a merchantable condition, is complied with if the goods are in proper condition, *i.e.*, such as to remain merchantable until the buyer has a reasonable opportunity of dealing with them in the ordinary course of business when delivered to the carrier,¹ provided the injury received during the transit does not exceed that which must necessarily result from the transit.²

§ 260.
Deterioration from exceptional causes.

If deterioration results from exceptional or accidental causes during transit, such as jettison,³ the loss falls on the owner.²

Contracts for delivery by instalments.

A contract may expressly be provided for deliveries by instalments,⁴ or it may be so inferred from the fact that some of the goods are in existence and some are still to be manufactured.⁵ Even if there is no such inference, if the buyer accepts a portion of the goods he waives any objection as to the necessity for a complete single delivery.⁵

Option to deliver by instalments.

The contract may give the seller an option to deliver by instalments⁶ in which case he must elect in due time, and if he elects one way or the other he is bound thereby.⁷

Where amount not fixed.

If the amount of the instalment is not expressed the presumption is that they are to be of equal quantities, and even if this is shown not to be the case the instalments must be reasonable.⁸

§ 261.
F. O. B.

A contract to deliver free on board, means that the seller is to put the goods on board at his own expense on account of the buyer, and the goods are at the

¹ *Beer v. Walker*, (1877) 46 L. J. C. P. 677.

² Section 38, S. of G. Act, *Bull v. Robinson*, (1854) 10 Ex. 342, 24 L. J. Ex. 165 (iron rusting).

³ See *per Brett*, L.J. in *Reuter v. Sala*, (1879) 4 C. P. D., p. 252.

⁴ As to what justifies a repudiation of such a contract, see § 533.

⁵ *Tarling v. O'Riordan*, (1878) 2 L. R. Ir. 82, approved in *Jackson v. Rotax*, (1910) 2 K. B. 937 O.A.

⁶ *Brandt v. Lawrence*, (1876) 46 L. J. Q. B. 237.

⁷ *Reuter v. Sala*, (1879) 4 C. P. D. 239.

⁸ *Calaminus v. Dowlais*, (1878) 47 L. J. Q. B. 575.

risk¹ of the buyer from the time when they are so put on board.² And this is so whether the goods are specific or not.³

§ 261.

Whether the property passes and therefore delivery is given, depends on the form of the bill of lading. For in such contracts the seller may reserve a right of control ; if this is done to prevent the property passing, there is no delivery ;⁴ if it is done merely to control the possession the property passes and the goods are at the buyer's risk.⁵ If the seller demands⁶ or takes⁷ mate's receipts in his own name he preserves his lien. But this may be varied by usage.⁸ The seller may stop goods so shipped in transit.⁹

The terms 'cost insurance freight,' have been considered above so far as the seller's duty to deliver at the port of destination or port of despatch is concerned.¹⁰ Where the terms are C. I. F., cash against documents, the seller is bound to ship goods of the contractual description¹¹ on a ship bound to the contractual destination,¹² and to tender to the buyer a proper¹³ bill of lading and a policy of insurance and must be ready and able to endorse the bill and transfer the policy on receiving payment of the price.¹⁴ If the seller fails to ship goods according to contract or to ship

§ 262.
C. I. F.

¹ But see *Ex parte Golding*, (1880) 13 Ch. D. 628, where it was said F. O. B. merely determined that the cost of shipment fell on the seller.

² *Brown v. Hare*, (1858) 27 L. J. Ex. 372, 29 L. J. Ex. 6.

³ *Stock v. Inglis*, (1884) 12 Q. B. D. p. 573.

⁴ *Ogg v. Shuter*, (1875) 1 C. P. D. 47 C. A. (the right of disposal is with the seller as long as the buyer is in default)

⁵ *Brown v. Hare*, (1858) 29 L. J. Ex. 6.

⁶ *Ruck v. Hatfield*, (1822) 5 B. & Ald. 632.

⁷ *Craven v. Ryder*, (1816) 6 Taunt. 438.

⁸ *Cowasjee v. Thompson*, (1845)

5 Moo. P. C. 165.

⁹ *Ex parte Golding*, (1880) 13 Ch. D. 678.

¹⁰ See § 158, and as to the passing of the property and risk see § 218.

¹¹ *Harland & Wolf v. Burstall*, (1901) 6 Com. Cas. 113.

¹² *Lecky v. Ogilvie*, (1897) 3 Com. Cas. 29; see *Acme Wood Co. v. Sutherland*, (1904) 9 Com. Cas. 170 (C.I.F. to the buyer's wharf-seller to pay charges incurred by delivery elsewhere).

¹³ See § 243.

¹⁴ *Abdul Hamed v. Toral Ali*, (1905) 5 L. B. R. 114; *Ireland v. Livingstone*, (1872) 5 H. L. 395, 408.

§ 262.

C. I. F.

at all the breach occurs then and there.¹ It is not sufficient to tender a bill of lading without a policy of insurance,² nor it seems to tender a policy upon a larger parcel of goods even if it is warranted free of particular average,³ and semble the policy must be obtained from a reasonably safe company. The policy need not cover the buyer's interest or freight, but should be for such an amount as an ordinary shipper would effect to protect his interest at the port of despatch.³ Generally a policy in the usual form covering deviation is enough, but where it was to be against all risks, a policy free of detention, though usual, was held insufficient.⁵ But the form of the policy is waived if it is accepted.⁶ It is not decided whether the protection must be entirely under the policy or may be under that and the bill of lading.⁷

Insurance money.

The buyer on a loss is entitled as between himself and the seller to the full amount payable under the policy although it may exceed the amount of his loss and he is not the trustee to the extent of the excess for the seller,⁸ but a seller is entitled under a C. I. F. contract to the money payable under an independent honour policy.⁹ As against the insurers he can only recover the amount of his actual interest on the goods.¹⁰

§ 263.

Where buyer and carrier change destination.

The buyer may enter into an agreement with the carrier to deliver elsewhere than the place to which the seller has consigned the goods. Such delivery discharges the

¹ *Biddell v. Clemens*, (1911) 2, K. B. 934 C. A. (reversed on other points, (1911) 28 T.L.R. 42 H.L.)

² *Hickox v. Adams*, (1876) 34 L. T. 404.

³ *Tamvaco v. Lucas*, (1861) 31 L. J. Q. B. 296.

⁴ *Burstall v. Grimsdale*, (1906) 11 Com. Cas. 280.

⁵ *Yuill v. Scott Robson*, (1908) 1. K. B. 270 C. A. 24 T. L. R. 180

(cargo of cattle).

⁶ *Dupont v. British S. African Co.*, (1901) 18 T. L. B. 24.

⁷ *Vincentelli v. Rowlett*, (1911) 16 Com. Cas. 310.

⁸ *Landaucr v. Asser*, (1905) 2 K. B. 184.

⁹ *Ralli v. Universal Marine Insurance Co.*, (1911) 2 K. B. 759.

¹⁰ *Ireland v. Livingstone*, (1872) L. R. 5 H. L. 395.

contract between the carrier and consignor.¹ But the buyer cannot force the carrier to enter into such an agreement,² nor it seems can he himself enter into such an agreement if he is bound by his contract not to.³ § 263.

A delivery of part of goods, in progress of the delivery of the whole, has the same effect, for the purpose of passing the property in such goods as a delivery of the whole; but a delivery of part of the goods, with an intention of severing it from the whole, does not operate as a delivery of the remainder. Section 92.
Effect of
part
delivery.

Illustrations.

- (a) A ship arrives in a harbour laden with a cargo consigned to A, the buyer of the cargo. The captain begins to discharge it, and delivers over part of the goods to A, in progress of the delivery of the whole. This is a delivery of the cargo to A for the purpose of passing the property in the cargo.
- (b) A sells to B a stock of firewood, to be paid for by B on delivery. After the sale, B applies for and obtains from A leave to take away some of the firewood. This has not the legal effect of the delivery of the whole.
- (c) A sells 50 maunds of rice to B. The rice remains in A's warehouse. After the sale, B sells to C 10 maunds of rice, and A at B's desire sends the 10 maunds to C. This has not the legal effect of the delivery of the whole.

It is a question of intention whether a delivery of part is in progress or the delivery of the whole. The fact that each one of several bales, subject of the contract, is to be paid for separately, on delivery, is an indication that § 264.
Part
delivery.

¹ *L. & N. W. Railway v. Bartlett*, (1861) 7 H. & N. 400; see § 411.

² *Malkarjun v. S. M. Railway Co.*, (1902) 4 Bom. L. R. 890.

³ *Ex parte Watson*, (1877) 46 L. J. Bk. 97; see § 412.

§ 264. delivery of one bale is not intended to pass the property in all.¹

In England there is no case where the delivery of part has been held to constitute a delivery of the remainder when kept in the *seller's own custody*; but there are cases where, by delivery of part, the seller's agent² or bailee³ have been held to have attorned to the buyer and become the buyer's bailee.

It is to be noted that the section only refers to the question of the passing of the property.

§ 265.
Onus.

Generally delivery of part of the goods sold is not equivalent to a delivery of the whole so as to destroy the vendor's lien. In the absence of evidence to the contrary, it is to be assumed that delivery of part is not intended to operate as delivery of the whole.⁴ But it is a question of intention.⁵ The party affirming the intention must prove it.⁶

Of course if there remains anything to be done to the remainder or the provisions of the foregoing sections have not been complied with, *i. e.* the remainder is not ascertained, the property cannot pass.

Section 93
Seller not
bound to
deliver
until buyer
applies for
delivery.
§ 266.
Demand by
buyer.

In the absence of any special promise, the seller of goods is not bound to deliver them until the buyer applies for delivery.

This is a departure from the English Law and the previous law in India⁷ and imports into all contracts apart from special agreement, a condition precedent to the

¹ *Mitchell Reid & Co. v. Buldeo*, 15 C. I.

² *Slubey v. Heyward*, (1795) 2 H. Bl. 504, 3 R. R. 486, where it was held to defeat the right to stop in transit.

³ *Hammond v. Anderson*, (1804) 1 B. & P. N. R. 69, 8 R. R. 763; see *Miles v. Gorton*, (1834) 3 L. J. Ex. 155, 2 C. & M. 504.

⁴ Benjamin, 4th Ed. 813; *Dixon v. Yates*, 5 B. & Ad. 313, 341; *Tanner v. Scovell*, 14 M. & W. 28.

⁵ *Ex parte Cooper*, 11 Ch. D. 68, 74 C. A.

⁶ *Kemp v. Falk*, (1882) 7 Ap. Ca. p. 586.

⁷ *Mansuk Das v. Rangayya*, (1863) 1 M. 162.

buyer's right to claim delivery.¹ This condition will, it seems, be treated on the same footing as a similar express condition in England, where such a request, if provided for by the contract must be made either personally or by letter;² and it seems that the necessity for such demand may be waived by the seller and is waived impliedly if he incapacitates himself from complying with the demand by consuming or reselling or otherwise so disposing of the goods as to render a demand idle and useless.³

§ 266.

May be waived.

The rule in the section has been followed in several cases. The demand must be made on the buyer's account.⁴ Where the buyer assigned his contract fictitiously, and afterwards obtained a reassignment, he was held not entitled to rely on a demand for delivery made by his nominal assignee.⁵ Such a demand must be made at a proper place and within the usual hours of business,⁶ and it seems a premature demand is nugatory.⁷

If the buyer makes an unreasonable delay before requiring delivery, the seller cannot, in the absence of special stipulations, treat the contract as rescinded.⁸ The seller must offer delivery or enquire whether the buyer intends to take the goods ; on a refusal to take them, section 120 of the Contract Act applies. And it seems that it is an implied condition that the buyer must take the goods in a reasonable time. If the buyer remain in

§ 267.
Delay in demanding.

Must be in reasonable time.

¹ Cf. *Armitage v. Insole*, (1850) 14 Q. B. 728, 80 R. R. 388.

² *Radford v. Smith*, (1838) 8 M. & W. 254.

³ *Bowdell v. Parsons*, (1808) 10 East. 359 ; *Amory v. Brodrick*, (1822) 5 B. & Ald. 712 ; see as to waiver of conditions implied by law § 588.

⁴ *Kanooram v. Gopal Chand*, (1875) 24 W. R. 178 ; *Mulji Govindji v. Nathubhai*, (1890) 15

B. 1 ; *Juggernath Khan v. Maclachlan*, (1891) 6. C. 681 ; see *Motichand v. Sreekissen*, (1900) 4 C. W. N. 318 A. C.

⁵ *Mulji Govindji v. Nathubhai*, (1890) 15 B. 1.

⁶ Contract Act s. 48.

⁷ See *Johnstone v. Cox*, (1880) 16 Ch. D. 571 (premature notice of assignment).

⁸ *Jones v. Gibbons*, (1853) 8 Ex. 920, 22 L. J. Ex. 347.

default he is liable¹ for a reasonable charge for the care and custody of the goods, and to an action for damages if the seller is prejudiced by the delay.² It was recently held that such expenses and damages must be proved as special damages,³ but this is not the English rule.³

**§ 268.
Demand for
too much.**

There appears to be no reported case as to whether a demand for delivery is good as to what ought to be delivered if the buyer demands more than he is entitled to. The question arose in a case of deliveries by instalments. Neither party had kept to the terms of the contract which was to deliver 36,000 tons of coals by monthly instalments of 3,000 tons on seven days' notice. In the last month 15,201 tons remained undelivered ; the buyers demanded delivery of 15,201 tons⁴ and it was held that such a demand was no valid demand for the 3,000 tons deliverable in that month.⁵

This view is in accordance with general principles ; if a buyer makes an erroneous demand, he cannot be said to have made a demand under the contract. Like all other conditions precedent this must be strictly performed, and to sustain a suit for non-delivery the buyer must show that he made a demand as authorised by the contract ; if he demands more than he is entitled, there is no rule by which the promisor is bound to supplement or correct the promisee's performance of a condition precedent.

**§ 269.
Demand for
too little.**

If a demand is made for less than the quantity due under the contract, it seems that this too would be bad, as the buyer is not entitled any more than the seller to deliveries by instalments unless the contract so provides ; and if such demand were intended to include the whole

¹ See § 221.

² S. of G. Act s. 87 ; *Greaves v. Ashlin*, (1813) 3 Camp. 426 ; *Bloxam v. Saunders*, (1825) 4 B. & C. 941 ; *Bartholomew v. Freeman*, (1878) 3 C. P. D. 316.

³ *Per* Harrington J. in *Marshall v. Laik*, (1911) Calcutta un-

reported.

⁴ Cf. *Tyers v. Rosedale*, (1875) 44 L. J. Ex. 130.

⁵ *Abdullahoy v. Mookundo Lall Laik*, No. 1089 of 1908 O. C. S. of the Calcutta High Court, 5th July 1909, Harrington, J.

contract, the buyer cannot compel the seller to alter the contract even if the seller in fact could have delivered only the amount demanded.

If delivery is to take place upon the doing of certain acts by the purchaser, the vendor is not in default for non-delivery until notice from the purchaser of the performance of such acts. Thus if delivery is to be on board the purchaser's ship as soon as it is ready to receive the goods, the purchaser must name the ship and give notice of readiness to receive the goods.¹ Conversely, if the seller is to give delivery at quay or warehouse, he must give notice of the place.²

§ 270.
Delivery
after cer-
tain event.

Notice of
readiness.

The general rule, however, is that if delivery is to be on the happening of a particular event, the promisor is bound to take notice at his peril.³

In absence of any special promise as to delivery, goods sold are to be delivered at the place at which they are at the time of the sale; and goods contracted to be sold are to be delivered at the place at which they are at the time of the contract of sale, or, if not then in existence, at the place at which they are produced.

Section 94.
Place of
delivery.

The English rule as provided for in section 29,⁴ is that in absence of special agreement, the place for delivery is the seller's place of business, if he have one, and if not, his residence. The Common Law was as the Code provides. The section which is peculiar to sales⁵ has been applied in various Indian cases.⁶

§ 271.
Place for
delivery.

¹ *Armitage v. Insole*, (1850) 14 Q.B. 728; *Sutherland v. Allhusen*, (1866) 14 L.T.N.S. 666; *Stanton v. Austin*, (1872) L.R. 7 C. P. 651.

² *Davies v. McLean*, (1878) 21 W. R. 264, 28 L. T. N. S. 113.

³ See para. 583, Benj. 5th Ed. 580.

⁴ S. of G. Act.

⁵ The general rule is laid down in s. 49 of the Code which excludes the Common Law.

⁶ See *Puttapa v. Virabhadrapa*, (1905) 7 Bom. L. R. 993 per Jenkins, C.J.; *Grenon v. Luchminarain*, (1896) 23 I. A. 119; *Dadabhai v. Saleman*. (1868) 5 Bom. H.C. (A.C.) 126, 128; 15 B. 1, 1 M.H.C. 142.

A contract to deliver at any place in Bengal to be mentioned hereafter does not come under this section but rather under section 49, the buyer having the right to name the place.¹

**§ 272.
Seller's
duty to
deliver.**

In the absence of a contrary agreement,² the seller at Common Law was not bound to send or carry the goods to the vendee. He did all that he was bound to do by leaving or placing the goods at the buyer's disposal, so that the latter might remove them without lawful obstruction.³ But under section 90 it seems that at any rate he must put the goods into the possession of the buyer; this apparently includes constructive possession, as by attornment.

In England where the plaintiff bought hops and was told that they were at a warehouse and separated and weighed them and took away part, but the rest were removed wrongfully by the seller's creditors: it was held, no action lay for non-delivery as the seller had done all he was bound to do.⁴

**§ 273.
Time for
delivery.**

The time for delivery is usually of the essence of a mercantile contract,⁵ but not the time for payment unless it is expressly made so,⁶ but it is a question of intention in each case.⁷ Where time is not of the essence, it has been held that it cannot be made so by the volition of one of the parties unless the other has done something which gives him a right to make it so. There must be conduct to justify rescission *sub modo*, i.e., if a reasonable notice to perform has not been complied

¹ *Grenon v. Luchminarain*, (1896) 24 C. 8. P.C. 23 I. A. 119.

² As to agreement to deliver at a particular place, see § 158.

³ *Salter v. Woolams*, 2 M. & G. 650; *Wood v. Manley*, 11 Ad. & E. 34; *Campbell*, p. 277; Benj. 4th Ed. 682, but in the 5th Ed. p. 682 the editor doubts this "without law-

ful obstruction," citing *Thol. v. Hinton*, (1855) 4 W.R. 26; *Buddle v. Green*, (1857) 27 L.J. Ex. 33.

⁴ *Wood v. Tassell*, (1844) 6 Q.B. 234.

⁵ *Bowes v. Shand*, (1877) 2 Ap. Ca. 455, Contract Act s. 55.

⁶ Cf. S. of G. Act s. 10 (1).

⁷ C. A. s. 55

with;¹ this notice can only be given when the other party has unreasonably delayed performance.² All the cases on this point relate to contracts for the sale of land; and it seems the rule has no application to instalment contracts for goods.³ It seems that in a mercantile contract delay sufficient to justify a notice, that unless the contract is performed it will be considered as repudiated, would amount to repudiation in itself, though giving notice is a safer course to adopt.⁴ § 273.

If no time is fixed by the contract and the seller must deliver without any application from the buyer, he must deliver in a reasonable time which is in each particular case a question of fact,⁵ and evidence of the facts and circumstances may be given even if the contract is in writing.⁶ Where no time fixed.

Reasonable time is difficult to define.⁷ It depends on the actual circumstance at the particular time.⁸

It does not mean enough to allow of a physical possibility of doing the act, but a business possibility.⁹

Even if a promise is to pay immediately on demand, the debtor must have an opportunity to get his money which he may have in a bank or near at hand.⁹

¹ *Per Fry, L.J., Green v. Sevin*, Ex. 920; *Sansom v. Rhodes*, 8 (1879) 13 Ch. D. 589; *Crawford v. Scott*, 544. See § 532.
Toogood. (1879) 13 Ch. D. 153; ⁷ *Brighty v. Norton*, (1862) 32 L. J. Q. B. 38.
Moulvie Mahomed v. Wilkie,
(1907) 11 C.W.N. 946 P.C.

² *Parker v. Thorold*, (1852) 16 Beav. 59 & *Taylor v. Broun*, (1839) 2 Beav. 180.
³ *Bengal Coal Company v. Homee Wadia*, (1899) 24 B. 97, 104; Cf. Contract Act ss. 46, 48 and 105 of the Negotiable Instrument Act; see *Dorasinga v. Aruna-chalan*, (1899) 23 M. 441, and see, for method of ascertaining what is reasonable, § 532.

⁴ See § 67.

⁵ As to the risk where the delivery is delayed see § 221.

⁶ S. of G. Act s. 46; *Hick v. Raymond*, (1893) A. C. 22 H. L.

⁷ *Ellis v. Thompson*, (1838) 3 M. & W. 445; *Jones v. Gibbons*, 8

Ex. 920; *Sansom v. Rhodes*, 8 Scott. 544. See § 532.

⁸ *Brighty v. Norton*, (1862) 32 L. J. Q. B. 38.

⁹ *Bengal Coal Company v. Homee Wadia*, (1899) 24 B. 97, 104; Cf. Contract Act ss. 46, 48 and 105 of the Negotiable Instrument Act; see *Dorasinga v. Aruna-chalan*, (1899) 23 M. 441, and see, for method of ascertaining what is reasonable, § 532.

⁹ *Toms v. Wilson*, (1862) 32 L.J. Q. B. 33, 382.

If the vendor agrees to send the goods, where no time is fixed, he must send in a reasonable time, and though the contract is in writing, facts and circumstances may be proved to show what is a reasonable time.¹

**§ 274.
Sunday.**

Delivery on a Sunday is not unlawful in India and it does not excuse a European from performing his contract because Sunday is the only available day,² provided it seems there are usual business hours, within the meaning of section 47, on a Sunday.

The following terms have been construed in England.

**§ 275.
Directly.**

"Directly" was said to mean a less protracted delay than a reasonable time.³

**As soon as
possible.**

"As soon as possible" was construed to mean as soon as the vendors could consistently with other orders in hand.⁴ But in a later case this was not followed: the words were said to mean in a reasonable time with an undertaking to do it in the shortest practicable time. Cotton, L. J., said it means "as quickly as it could be made in the largest establishment with the best appliances."⁵

Forthwith.

"Forthwith" if the price is to be paid within 14 days, means within 14 days.⁶ July-August shipment, means completed shipment in August.⁷

**Not later
than.**

"Not later than due allowance being made for delays" was construed in *Re Lochie* to except ordinary delays.⁸

Clearance.

Clearance before a particular date means compliance before that date with Customs Regulations so that the vessel is authorised to sail.⁹

¹ *Ellis v. Thompson*, (1838) 3 M. & W. 445; *Jones v Gibbons*, 8 Ex. 920; *Sansom v. Rhodes*, 8 Scott. 544.

² *Lalchand v. Kersten*, (1890) 15 B. 338.

³ *Duncan v. Topham*, (1849) 8 C. B. 225.

⁴ *Altwood v. Emery*, (1856) 26 L.J.C.P. 73.

⁵ *Hydraulic E. Co. v. McHaffie*,

(1878) 4 Q. B. D. 670 C. A.

⁶ *Staunton v. Wood*, (1851) 16 Q.B. 638; *Roberts v. Brett*, (1865) 11 H.L.C. 337, 34 L.J.C.P. 241.

⁷ *Nusservangi v. Volkart*. (1888) 18 B. 15.

⁸ *Re Lochie & Craggs*, (1901) 7 Com. Cas. 7, 86 L.T. 388.

⁹ *Thalmann v. Texas*, (1900) 82 L. T. 833 C.A.

Delivery may be postponed at the request of the buyer or seller. In India such an agreement has been held to be binding without consideration.¹ Such postponement in England, unless amounting to a contract, is a mere forbearance, and either party is at liberty at any time to insist upon his rights under the original contract.² If the request comes from the vendee and the vendor having agreed to delay, tenders in the prolonged period he can recover.³ If the request comes from the vendor he must rely on the assent of the vendee which is a new contract.⁴ Such postponement does not altogether waive any condition as to time but only substitutes the new period which may still be a condition precedent.⁴

§ 276.
Postponed
delivery.

In the case of instalment contracts for delivery in certain quantities, if there has been a shortage beyond what is reasonable, the contract is broken and the seller cannot afterwards make up a deficiency by thrusting the balance on the buyer.⁵ This is clearly so if each delivery is to be treated as a separate contract.⁶ So too if the contract is to be performed within a fixed time by monthly deliveries⁷ any shortage cannot be demanded after that time has expired.⁸

Instalment
contracts.

But if the parties have agreed to postpone monthly deliveries even when they are to be treated as separate contracts,⁹ the buyer may, if that was the agreement, in the last month demand delivery of the whole residue,¹⁰ though

¹ *Davis v. Candasami*, (1896) 19 M. 398; but see § 106.

² *Ogle v. Earl Vane*, (1868) L.R. 3 Q. B. 272; *Huchman v. Haynes*, (1875) L. R. 10 C.P. 598; *Tyers v. The Rosedale Iron Co.*, (1875) L. R. 10 Ex. 195.

³ *Plevins v. Downing*, (1876) 1 C. P. D. 220.

⁴ *Barclay v. Messenger*, (1874) 43 L. J. Ch. 449.

⁵ *Barningham v. Smith*, (1874) 31 L. T. 549.

⁶ *Higgins v. Pumpherstone*, (1898) 20 Ret. 532.

⁷ See *Nederlandsche v. Challen*, (1898) 14 T. L. R. 322.

⁸ *Stephens v. G. W. Colliery*, (1899) 15 T. L. R. 432.

⁹ See Benj. 5th Ed. 721.

¹⁰ *Tyers v. Rosedale Iron Co.*, (1875) L. R. 10 Ex. 195.

§ 276. apparently the seller has a reasonable time in which to deliver it.¹

Damages will be calculated as at the date of the postponed performance² and not at the original due date as in cases where there is no agreement to extend the term.³

If without some arrangement being come to within the contract time either party has made default in delivery or acceptance, he cannot sue on the original contract because he was not ready and willing to perform it.⁴ But apparently a subsequent agreement to allow him to complete is binding in India, but it seems only if made before a breach of the contract.⁴ For it has been held that an agreement extending the time for performance of a contract falls under section 63 and requires no consideration to support it. The Indian Law does not follow the Common Law in this respect.⁵

§ 277.
Expenses of
putting
goods into
deliverable
state.

The Sale of Goods Act⁶ provides that the seller unless otherwise agreed, must bear the expenses of, and incidental to, putting the goods into a deliverable state. This is so in India, otherwise he cannot plead he was ready and willing to deliver. This was the Common Law⁷; for payment of charges which must be paid before the seller can give delivery is part of the seller's duty to deliver.⁷

So in America on a sale of wool in bulk the seller was not allowed the cost of putting the part sold into the buyer's sacks.⁸

§ 278.
Delivery of
too little.

Delivery of less or more than the contract quantity is no tender in England, subject to trade usage, agreement, or course of dealing.⁹

¹ Benj 5th Ed. 690 4th Ed. 695.

² *Ogle v Vane*, (1868) L. R. 2 Q. B. 275.

³ *Barningham v. Smith*, (1874) 31 L. T. 540.

⁴ *Plevins v. Downing*, (1876) 1 C. P. D. 220.

⁵ *Davis v. Candasami*, (1896) 19 M. 398, but see *ante* § 106.

⁶ Section 29 (5).

⁷ *Playford v. Mercer*, (1870) 22 L. T. 41; *Acme Wood Flooring Co. v. Sutherland*, (1904) 9 Com. Cas. 170 (C. I. F. to buyer's wharf).

⁸ *Cole v. Kew*, (1848) 20 Vt. 21, cited in Benjamin 5th Ed. p. 695,

⁹ S. of G. Act s. 30 (1), (2), (3), 30 (4).

As a general rule the buyer is not bound to accept a quantity of goods less than he bargained for,¹ and may reject them, but if he accepts them he must pay their value.² § 278.

In entire contracts for delivery by instalments of a specified amount of goods if no part of the price is payable until complete delivery, the buyer may reject any instalments received if the seller fails to deliver the entire quantity; for the seller does not perform his contract unless he delivers the entire quantity.³ But the buyer must pay the value of any part which he retains⁴ after the time for delivery is past, and cannot retain the portions delivered and resist payment until the rest is delivered.⁵ The seller cannot sue in such a case for any part of the price until the expiration of the whole period for deliveries, as the buyer may, if the whole quantity is not delivered, elect to reject the part received.⁶ And it has been said that in such a case the buyer, if he accepts any instalment and at any rate if he puts it out of his power to return it, cannot thereafter reject a further instalment for breach of conditions.⁶ But this seems doubtful, for part acceptance only has this effect where the contract is not severable,⁷ and semble all contracts whereunder deliveries are to be or are made by instalments, are severable for this purpose though otherwise entire.

But if the instalments are to be paid for separately the buyer must accept and pay for each instalment on delivery unless it then appears that the seller cannot complete the To be paid for separately.

¹ *Bowes v. Shand*, (1877) 2 A. P. C. 455; Contract Act s. 39; S. of G. Act s. 80. But see § 518.

² Contract Act s. 65, Illus. (b); *Macfarlane v. Carr*, (1872) 8 B.L. R. 459.

³ *Oxendale v. Wetherell*, (1829) 9 B. & C. 386; *Colonial Ins. Co. v. Adelaide*, (1886) 12 A. C. 128

⁴ *Shipton v. Casson*, (1826) 5 B. & C. p. 383.

⁵ *Waddington v. Oliver*, (1805) 2 B. & P. N. R. 61, 9 R. R. 614.

⁶ *Jackson v. Rotax*, (1910) 2 K. B. 937 C. A.

⁷ See S. of G. Act s. 11 (c); see under "Part Acceptance" § 560.

§ 278. whole quantity.¹ But even where each instalment is to be paid for on delivery, if a failure to deliver the whole quantity would go to the root of the contract, as in the case of a book published in parts, it seems the buyer could reject the parts received if the seller failed to deliver the rest and could recover the price paid.² Whether a failure goes to the root of the contract is to be determined from the circumstances of each case.³

Where
whole
paid for.

If the buyer has paid for a certain quantity of goods, and only part is delivered, he may accept the goods delivered and, if his conduct has not shown that he took them as a due execution of his order, may recover the difference in price as on a failure of consideration,⁴ unless by the contract he has taken the risk of the quantity paid for being more or less.⁵

Where seller
only delivers
part.

If the seller only delivers part of the goods, this amounts to an offer of a new and substituted⁶ contract, and if the buyer elects to take the goods whether the price has been settled for such goods or not, he is only bound to pay the market rate, *i.e.*, a reasonable price under section 89, and not the contract rate.⁷

Can accep-
tance of a
quantity
delivered be
divided.

It is stated in Benjamin⁸ that as the delivery of a less quantity of goods than was ordered under an entire contract amounts to an offer by the seller of a new contract⁹

¹ *Brandt v. Lawrence*, (1876) 1 E. & B. 886.
Q. B. D. 344.

² Benjamin 5th Ed. 697, but his view that the buyer must return the goods, delivered conflicts with the S. of G. Act s. 36 and *Grimoldby v. Wells*, (1875) 44 L. J. C. P. 203.

³ S. of G. Act s. 31 (2).

⁴ *Devaux v. Connolly*, (1849) 19 L. J. C. P. 71; *Biggerstaff v. Rowall's Wharf*, (1896) 2 Ch. 93 C. A.

⁵ *Covas v. Bingham*, (1853) 2

⁶ *Wallis v. Pratt*, (1910) 2 K.B. 1003 C. A.

⁷ *Macfarlane v. Carr*, (1872) 8 B. L. R. 459 C. A. 17 W. R. 244 see notes under s. 119.

⁸ Benjamin 5th Ed. p. 698: *Champion v. Short*, (1807) 1 Camp. 53. But see *Tarling v. O'Riordan*, (1878) 2 L. R. Ir. 82.

⁹ Strictly speaking it is an offer of a substituted contract, *Wallis v. Pratt*, (1910) 2 K. B. 1003 C. A.

confined to that quantity, the buyer cannot divide his acceptance, unless the seller agrees thereto. The buyer must accept or reject all.

§ 278.

The last proposition is doubtless correct. But the one authority¹ cited which is in point, is against the view that there is a fresh contract, but decided that acceptance of any portion showed that the contract was divisible. In that case the order was for plums, raw sugar, and white sugar. The seller delivered the plums and the raw sugar. The buyer accepted the plums and rejected the sugar. The proposition stated by Benjamin was never even argued. Lord Ellenborough held, that where several articles are ordered at the same time, it does not follow, although there be a separate price fixed for each, that they do not form one gross contract. If the buyer in this case had refused both the plums and the raw sugar no action would have lain: but he completely rebutted the presumption of a joint contract including all the articles ordered, by accepting the plums. Therefore if the raw sugar was of the quality agreed on, and was delivered in reasonable time, he is liable for the price, and the other case cited, *Tarling v. O'Riordan*,² merely holds that if the goods are deliverable by instalments, acceptance of the first, does not affect the right to refuse a second for want of conformity with the contract.

The quantity to be delivered is sometimes stated in the contract with the addition of words such as "about" or "more or less" which show that the quantity is not restricted to the exact number or amount specified, but that the vendor is to be allowed a certain moderate and reasonable latitude in performance. Thus in *Cross v. Elgin*,³ where the expression used was "about 300 quarters (more or less) of rye also about 50 quarters of wheat;" on the

§ 279.
Contracts
for "about."

¹ *Champion v. Short*, (1807) 1
Camp. 52.

² (1878) 2 L. R. Ir. 82.

³ (1831) 2 B. & Ad. 106.

§ 279. sellers sending 345 quarters of rye and about 50 quarters of wheat, the buyers gave bills for 300 and 50 only. The sellers made no dispute as to the wheat, but insisted on the buyers taking the 345 quarters of rye. It was held that this was excessive ; two Judges being doubtful as to it being in every case excessive, but holding the onus was on the seller to show that it was not. The question of the admissibility of proof of a custom on the point was not decided, but it seems it would be admissible.

Custom as to.

Objection must be made before acceptance.

Where buyers had taken delivery of 127 tons of coal on a contract to deliver 100 "more or less" and make no offer to return the excess, the Court refused to listen to their objection to paying for the 127 tons.¹

More goods sent.

It is not a valid tender to send goods sold mixed with other goods. This last case is provided for by section 119 of the Contract Act ; and that section probably is intended to cover a case where more goods than ordered are sent.²

"Say".

If the parties intend to sell by estimation only, it is open to them to state that fact. The word "say" may be a word of some ambiguity : it is however open to the seller to state that he sold the entire stock of "about" 700 or 800 tons or "by estimate" or "approximately" of that quantity, but if he sell "entire stock at a warehouse of 700/800 tons, say 7- or 800 tons, he contracts to sell 700 or 800 tons."³

But the expression "say about so many" has been held to emphatically mark the vendor's purpose to guard himself against being supposed to have made any absolute promise as to quantity.⁴

¹ *Cockerell v. Aucompte*, (1857), 6 L. J. C. P. 194, 2 C.B.N.S. 440.

² See notes to § 119.

³ *Moore v. Campbell*, (1854) 10 Exch. 328; *McLay v. Perry*, (1881) 44 L. T. 152; *Harland v. Burstall*, (1901) 6 Com. Cas. 113 ; *Société Anonyme v. Scholefield*, (1902) 7 Com. Cas. 114 (custom as to 5 per cent. margin).

⁴ Woodroffe, J. in *Kallyanjee Shamjee v. T. C. Shorrocks*, (1910) 37 C. 334 ; see § 68.

⁵ See Benjamin 4th Ed. 701 : *McConnell v. Murphy*, (1873) L. R. 5 P.C. 203 ; but in a charter party the same words were held to be words of contract and not of estimate: *Morris v. Leviston*, 1 C.P. D. 155.

The expression "say from" 1,000 to 1,200 gallons per month, was held to be an estimate only.¹ § 279.
"Say from."

"Say not less than" was construed in *Leeming v. Snaith*.²

The question was discussed in America and the following rules laid down³ :—

1. Where goods are identified by reference to independent circumstances, *e. g.*, all the goods deposited in a certain warehouse, or all that may be manufactured by the vendor in a certain establishment, or to be shipped in certain vessels, and the quantity is named with the qualification of "about," or more or less, or words of like import, the contract applies to specific goods and the naming of the quantity is not regarded as in the nature of a warranty, but only as an estimate of the probable amount, in reference to which good faith is all that is required of the party making it. American
rules.

"About".

2. Where no such independent circumstances are referred to and the engagement is to furnish goods to a certain amount, the quantity specified is material, and governs the contract. The adoption of qualifying words in such cases only provides against accidental variations arising from slight and unimportant excesses or differences in number, manner or weight.

3. But the qualifying words may be supplemented by other stipulations or conditions, *e. g.*, "as much as the seller shall manufacture or the buyer shall require" and this will then govern the contract.

The first rule does not seem to have been cited to the Court in Calcutta Appeal Case.⁴

As to the buyer's right of inspection *see* para. 618. Where a "cargo" is sold, that word is susceptible of various § 280.
"Cargo."

¹ *Gwillim v. Daniell*, (1835) 2, C. M. & R. 41; *Morris v. Levison*, (1874) 1 C. P. D. p. 159.

² (1851) 16 Q. B. 275.

³ *Browley v. The United States*,

(1877) 96 U. S. (8 Otto.) 168, cited with approval in Benjamin 4th Ed. p. 701.

⁴ *Kallyanjee Shamjee v. Shorroch*, (1910) 37 C. 384.

§ 280. meanings and must be interpreted with reference to the particular contract.¹ Generally if, in addition to the word "cargo," a specific quantity of goods is mentioned, the governing word is *primâ facie* "cargo" and the statement of quantity will be treated as only an estimate² and unless something plainly shows the contrary to be intended, the buyer is bound to take the cargo whatever its quantity may be.

The term may mean a full and complete cargo as in *Anderson v. Morice*¹ and on a sale of a "cargo" the seller is not entitled, even if the quantity is approximately fixed, to tender a part of a cargo, although it may be of the right quantity.³ But the term will not be so strictly interpreted as between a commission agent and his buyer.⁴

§ 281.
May be in
any way
sanctioned.

Delivery may be made at any time or in any manner which the buyer prescribes or sanctions.⁵

If the delivery is to be in a particular manner, as to a certain carrier or at a certain place, the delivery according to the order, completes the contract without further communication, and the buyer must pay though he never receives the goods.⁶

But unless excused under section 50 or 63 the delivery must be as contracted for, subject to any usage or custom.

Customary
method.

The adoption of a customary method of sea carriage by sellers is not inconsistent with the contract to deliver.⁷

If it is customary to give delivery orders for "about" so much, this is a sufficient compliance with a contract to deliver a specific amount, even if the vendor on being

¹ *Anderson v. Morice*, (1876) 1 Ap. Ca. 713; *Colonial Ins. Co. v. Adelaide*, (1896) 12 Ap. Ca. 128.

² *Levi v. Berk*, (1886) 2 T. L. R. 898 C. A.

³ *Borrowman v. Drayton*, (1876) 2 Ex. D. 15 C. A.; *Kreuger v. Blanck*, (1869) L. R. 5 Ex. 179.

⁴ *Ireland v. Livingstone*, (1892) 5 H. L. 395.

⁵ Contract Act, s. 50.

⁶ *Brogden v. Metropolitan Ry.*, (1877) 2 A. C. 666.

⁷ *Burstall v. Grimsdale*, (1906) 11 Com. Cas. 280.

asked to guarantee that the contract quantity is in the warehouse, refuses to do so.¹ § 281.

Where the contract is for instalments, the seller cannot call on the buyer to take a delivery order for the whole at once.² No right to demand acceptance of all, where instalments.

Refusal to accept a kutchra order, that is, an unaccepted delivery order, although that complied with the contract does not entitle the seller to rescind,³ but in such case there is an implied undertaking that the order will be accepted by the bailee when duly presented.³ Kutchra order.

In this connection it must be noted that under section 38 the seller's duty to deliver is discharged if he tenders the goods. § 282.
Tender.

If a proper tender has been made and refused, the buyers cannot demand a second.³ The question as to when tender is excused is discussed under conditions precedent.

A tender of delivery entitling the vendor to payment of the price must, in absence of a contractual stipulation to the contrary, be a tender of possession⁴ as well as an offer to transfer the property.⁵

A tender to be valid must comply with the terms of the contract. When the contract was to give railway receipts free from charges, a tender of receipts subject to charges, without an offer to allow a deduction from the price for such charges, was held invalid.⁶ § 283.
Tender must comply with contract.

And of course goods tendered must be of the kind contracted for.⁷ The subject is further discussed *infra*.⁸

¹ *Moore v. Campbell*, (1854) 10 Ex. 323, 23 L. J. Ex. 310.

² *Ramdeo v. Cassim Mamoojee*, (1893) 21 C. 178 A. C.

³ See *Heilgers v. Jadub Lall*, (1889) 16 C. 417.

⁴ *Biddell v. Clemens*, (1911) 1 K. B. p. 956 C. A., but a bill of lading is sufficient if the goods are at sea: *ibid.* 28 T. L. R. 42

reversing the O. A.

⁵ *Calcutta Co. v. DeMattos*, (1868) 32 L. J. Q.B. 322, (1864) 33 L. J. Q. B. 214.

⁶ *Motichand v. Sreekissen*, (1900) 4 C. W. N. 313 A. C. and see § 243 as to bills of lading.

⁷ *Bombay United Merchants Co. v. Doolubram*, (1887) 12 B. 50.

⁸ See §§ 288, 516.

A contract for cash against a delivery order on bailees, was held not to bind the seller to tender an order accepted on the face of it by the bailees, but there was an implied undertaking that the bailees should accept the delivery order and deliver the goods in terms thereof when presented.¹

**§ 284.
Right of
inspection.**

The buyer has a Common Law right to have inspected goods against payment and this cannot be taken away from him without some contract express or implied.² This is provided by section 38 of the Contract Act.

**Opportunity
to survey.**

A reasonable opportunity to survey under section 38 does not necessitate a joint survey; 24 hours is a reasonable time. There must be some limit to the right to inspect.³

**Closed
packages.**

It is not enough to offer to let the buyer take away closed packages alleged to contain the correct goods.⁴ For without an opportunity to inspect a tender in absence of a contract to the contrary is no tender.⁵

**§ 285.
Waiver of
right.**

It must be remembered that the buyer may waive the right to inspect as far as the right to reject upon such inspection and yet not waive the right to claim compensation if on a subsequent inspection the goods prove not to be according to contract,⁶ for by acceptance itself the only waiver is of condition precedent as such and not of the right to claim compensation if the buyer gives notice of his claim under section 118.⁶

**§ 286.
No duty on
buyer to
specify
defects
in tender.**

The buyer to whom a tender is made is under no duty whatever to point out that the tender is defective, or to give the seller an opportunity to supplement it. His duty arises under the contract when a sufficient offer of performance is made to him and not till then. If at the

¹ *Ramdeo v. Cassim*, (1898) 21 C. 173.

² *Biddell v. Clemens*, (1911) 1 K.B. p. 950 C.A. rev. 28 T.L.R. 42.

³ *Ruttonsey v. Jamandas*, (1882) 6 B. 692.

⁴ *Isherwood v. Whitmore*, (1843) 11 M. & W. 347, and see § 653.

⁵ *Biddell v. Clemens*, (1911) 1 K.B. p. 949 C.A. rev. 28 T.L.R. 42.

⁶ See under "Waiver" § 568.

time of tender he rejects goods on one ground only which is found insufficient, he is not thereby disentitled from relying upon other grounds which his rights under the contract entitle him to rely upon.¹ § 286.

This decision is in agreement with the English cases where it has been held that the fact that one party at the time of the tender insists on two conditions, only one of which he is entitled to exact, does not vary his right in respect of the other.²

But Brett, L. J.³, said that if on a tender of 25 tons of which the buyer was only bound to take 20, the buyer refused it on the ground that they were only bound to take 20, so that he left it open to be said that if 20 tons had been offered he might have accepted, then the tender would have been bad. But the buyer did not take that point, the refusal in terms amounted to saying that he would not take 25 or 20 tons. This refusal absolved the seller from tendering 20 tons. Waiver of any objection has been inferred from delay,⁴ and in cases of tender of the price waiver of the form of tender is readily inferred from the fact that no objection is taken.

Waiver of objections.

For cases in which a seller may make a second tender on rejection of the first, see para. 184.

Second tender when allowable.

If it is the seller who sues for non-acceptance he has not launched his case until he has shown that he tendered the goods contracted for, or was excused from tendering : for whoever sets up a valid tender must prove that the goods offered were of the description contracted for,⁵ subject only to the rule *de minimis*.⁶

§ 287.
Onus of proving valid tender.

¹ *Motichand v. Fulchand*, (1898) 26 C. p. 157 O.C., citing *Cowan v. Milburn*, (1867) L.R. 2 Exch. 230 ; *Mothoormohun Roy. v. Bank of Bengal*, (1878) 3 C. 392.

² *John Bond v. Nurse*, (1847) 10 Q. B. 244 (10 Ad. & E. Q.B.N.S.).

³ Dissenting in *Reuter v. Sala*,

(1879) 49 L. J. C. P. 492.

⁴ *Cockerell v. Aucompte*, (1857) 26 L. J. C. P. 194.

⁵ *Bowes v. Shand*, (1877) 2 Ap. Ca. 455 H. L. ; *Motichand v. Fulchand*, (1898) 26 C.p. 155 O.C.

⁶ *Jackson v. Rotax Co.*, (1910) 2 K. B. 939, 945 C.A. See § 518.

§ 287.

Method of
proving
inferiority.

In a suit for damages the plaintiff must prove the inferiority.¹ Such inferiority can be proved by a survey,² if the method of examining a portion only is the established custom.¹ As a general rule the person suing for a breach of warranty must show how he has dealt with the goods³ and what damage he has suffered. But where the custom of the trade fixes a definite scale for calculating damages for inferiority, no such proof is necessary.¹ But it seems that the other party might show that there was no damage.

When the Calcutta High Court inferred the quality of 11,000 bags of cutch from their own view of a sample the size of which did not distinctly appear, the Privy Council said they were wholly unable to acquiesce on the inference drawn in the absence of any evidence to support that finding.⁴

§ 288.

What
amounts
to tender.

The seller's obligation to deliver is fulfilled if he tenders goods answering to the contract.⁵ The tender must be made wherever the goods are deliverable,⁶ and as long as the seller gives due notice⁷ that he is ready and willing to give the buyer every facility for taking delivery at the proper place, he is discharged from his liability and can sue for non-acceptance. Unless the contract so provides there is no duty on the seller to take the goods to the buyer.⁸

§ 289.

What is
notice of
readiness
and wil-
lingness.

The duty of giving notice was held to be discharged where the seller did his best to inform the buyer, by going to his place of business, that he was ready and willing to

¹ *Boisogomoff v. Nahapiet*, (1902) 29 C. 323, 6 C. W. N. 495 A. C.

² As to the effect of a joint survey see *Rut tousey v. Jamandas*, (1882) B. 692.

³ Cf. *Buchanan v. Avdall*, (1875) 15 B. L. R. 276 A. C., as to seller's dealings with rejected goods.

⁴ *Gun Kim Swee v. Ralli*, 13 I.A.

p. 65.

⁵ Contract Act s. 38; *Startup v. Macdonald*, (1843) 5 Man. & G. 593, 610, 64 R.R. 810, 824.

⁶ Contract Act s. 38 illus.

⁷ *Doogood v. Rose*, (1850) 9 C. B. 132.

⁸ *Simson v. Gorachand*, (1883) 9 C. 473.

deliver, although the buyer was not found there and no further steps were taken.¹

As long as the goods are under the control of the seller so that they are able to deliver them at the correct time,² it is immaterial when their legal title was completed,³ and a tender of a third party's goods is valid provided the seller could secure the buyer a valid title thereto.³

§ 290.
Goods only
need be
under the
control
of the
tenderer.

¹ *Juggernaut Sew Bux v. Poulton*, (1868) 2 B.H.C. 253, 256; *Ram Dyal*, (1883) 9 C. 791.

² *Borrowman v. Free*, (1878) 48 L.J.Q.B. p. 70, although not so when documents of title had to be tendered.

³ *Rultonsey v. Jamandas*, (1882) 6 B. 692; *Jivraj Megji v. Maganbhai v. Manchabhai*, (1866) 3 B.H. C. 79. See *Cohen v. Cassin*, 1 C. 264, where the seller could only deliver under a collateral contract, and could not pay for the goods unless his buyer paid him.

CHAPTER XI.

Payment.

**§ 291.
Payment.**

The chief duty of the buyer in a contract of sale is to pay the price in the manner agreed on.¹

The terms of the sale may require—

- (1) an absolute payment in cash, and this is always implied if nothing is said.
- (2) a conditional payment in promissory notes or acceptances.
- (3) it may be agreed that credit is given for a stipulated time, without payment absolute or conditional.

In the first two cases the buyer is bound to pay or otherwise comply with the conditions as to payment if the vendor is ready to deliver the goods, as soon as the contract is made; but in the last he has a right to demand possession of the goods without payment. In calculating the time given for credit the day on which the contract is made is to be excluded.² A contract for 14 days' credit was construed to mean cash on delivery which might be taken within 14 days.³

**§ 292.
Right of
inspection
previous to
payment.**

Where right
of election no
duty to pay
before
tender.

A tender of delivery entitling the vendor to payment of the price must in the absence of a contractual stipulation to the contrary be a tender of possession.⁴ The duty to pay depends on the sufficiency of the tender of delivery, and as stated above unless the buyer has an opportunity to inspect or has contracted himself out of that right, a tender without such opportunity is no tender.⁵ Consequently even where the seller has a right of election, still as he may not select goods according to contract, the buyer's duty to accept and pay is not *primâ facie* at the time of the

¹ See section 50 Contract Act.

² *Webb v. Fairman*, 7 L. J. Ex. 140, 3 M. & W. 473.

³ *Godts v. Rose*, (1854) 25 L. J. C. P. 61

⁴ *Biddell v. Clemens*, (1911) 1 K. B. p. 956 C. A., except where the goods are at sea, *ibid.* 28 T. L. R. 42, reversing the C. A.

⁵ *Ibid.* p. 949.

exercise of the election, as for instance on shipment of goods intended for the contract and unconditionally appropriated thereto, but only after inspection of the goods when tendered.¹

Whatever the contract may provide, the buyer may pay in any manner or at any time that the seller prescribes or sanctions²; and the plea of payment may be based on facts which in the absence of the seller's consent would not support it.³

§ 293.
What
amounts to
payment.

So long as the buyer pays in accordance with the seller's request, it is a valid payment even if the money never reach the seller,³ e.g. if it be transmitted by post in compliance with the seller's directions, and is lost or stolen; but in such case it must be posted in the ordinary way.⁴

In any way
sanctioned.

In the case of the *Great N. Ry. v. Thairlwall*⁵ it was held that the creditor and debtor can agree to payment in some other form than cash, and when the creditor asks the debtor to send by post, then the risk of loss in transit falls on the creditor and the posting is equivalent to payment. In *Norman v. Rickells*,⁶ the cheque sent had been paid to third parties, but that did not affect the principle. The only obligation in such cases is to post, and by doing so the debtor is discharged. The facts were a dividend warrant was sent by registered post by a Company in which the plaintiff was a shareholder to the plaintiff and lost in the post; the Company asked for an indemnity before paying the dividend. The plaintiff refused to

¹ *Ibid.* p. 949, citing *Parker v. Schuller*, 17 T. L. R. 299 C. A.; *Crozier v. Auerbach*, (1908) 2 K. B. 161.

² Contract Act s. 50, see *Page v. Meek*, (1862) 3 B. & S. 259 (money deposited with a stakeholder).

³ *Eyles v. Ellis*, (1827) 4 Bing. 112 (payment into bank which failed); Contract Act s. 50, Illustration (a); *Edmunston v. Longton*,

(1902) 19 T. L. R. 15 (putting money into slot of gas meter).

⁴ Contract Act s. 50, Illustr. (d); *Warwick v. Noakes*, Peake 68, 98; *Hawkins v. Rutt*, Peake 186, 248.

⁵ Div. Ct. 18th June 1910, cited in 14 C. W. N. cclxxiii.

⁶ 3 T. L. R. 182.

§ 293. give such indemnity and sued for payment. The suit was dismissed, the plaintiff had assented to the warrants being posted to him and the risk of loss was with him.

Assent must be clearly proved.

It seems that the seller's direction or assent must be clearly proved. In *Pennington v. Crossley*,¹ the Court of Appeal declined to infer a request to send by post from a course of twenty years dealing in that way without objection, holding it was merely a convenient way of doing business. Two judges based their view partly on the form of receipt sent with the cheque "in settlement of account."

But of course although the seller has requested the buyer to send a cheque or other negotiable instrument instead of current coin, the rule applies that such is only payment conditional on the instrument being honoured when and if duly presented.² If a cheque is stopped by the drawer, the original remedy in respect of the debt is revived.³

Unauthorised method of payment.

If the buyer adopts a method of payment without any sanction from the seller, he must at any rate send it in a proper form.⁴ But the seller may by his conduct waive any irregular method of payment.⁵ If the creditor accepts a sum payable on a certain day, after that day and in a form⁶ not authorised by the agreement, he waives any objection on those grounds to the tender.⁷

§ 294.
Special terms.

Cash less discount or bill.

The terms of payment may be cash less discount at a fixed date with option of bill, or *vice versa*, or "bill, with option of cash less discount." In the former case, the seller can sue for the price of goods sold and delivered

¹ (1897) 77 L. T. 43 A. C.

² See *Kedarmal v. Surajmal*, (1907) 9 Bom. L. R. 903, 911.

³ *Yarlagadda v. Gorantte*, 29 M. 111; *Currie v. Misa*, L. R. 10 Ex. 153, 1 Ap. Ca. 554.

⁴ *Gordon v. Strange*, (1847) 1 Ex. 477 (Post Office order payable to wrong name).

⁵ *Caine v. Coulson*, (1863) 32 L.J. Ex. 97; *Hardman v. Belhouse*, 9 M. & W. 596.

⁶ *Caine v. Coulson*, (1863) 32 L. J. Ex. 97.

⁷ *Shipton v. Casson*, (1826) 5 B. & C. 378, 4 L. J. K. B. 199; see Contract Act s. 55.

immediately on the buyer's refusal to accept at the date fixed. In the latter the seller cannot sue for the price until the due date of the bill drawn by him, even although the buyer has refused to accept, but he may bring a special action for non-acceptance of the bill.¹ If the terms are cash at discount or credit a buyer paying part in cash is deemed to have elected to pay all in cash.² Cash against bill of lading means that the purchaser must pay when a duly indorsed bill of lading effectual to pass the property in the goods, is tendered to him,³ though it has been drawn in triplicate and all three bills of the set are not then tendered or accounted for.⁴ And in a contract C.I.F.⁵ to London, terms net cash, the buyers are bound to pay on tender of the shipping documents.

§ 294.

Or credit.

Cash against bill of lading.

C. I. F.

If the goods are lost at sea, the buyer would have to pay against delivery of the bill of lading and policy of insurance.⁶

In a contract F.O.B. cash on delivery, payment may be required upon delivery of the goods at the time and place mentioned for delivery in the contract.⁷

F. O. B.

There is no need for a demand unless the contract so provides⁸; if the price is payable immediately the buyer must pay or he is liable to an action.⁹ The buyer, however, has a reasonable time in which to pay, even if the

§ 295.
No need of demand.

Reasonable time to pay.

¹ See *Anderson v. The Carlisle Horse Co.*, 21 L.T.N.S. 760, Benjamin, 4th Ed. 715.

² *Schneider v. Foster*, (1857) 2 Exch. 4, 2 H & N 4.

³ *Ireland v. Livingstone*, (1872) L. R. 5. H. L. 395; *Crozier v. Aurbach*, (1908) 2 K. B. 161, cited in *Biddell v. Clemens*, (1911) 1 K. B. 984 C. A.

⁴ *Sanders v. Maclean*, (1883) 11 Q. B. D. 327 C. A.; but see *Biddell v. Clemens*, (1911) 2 K. B. 984, C. A.

⁵ *Biddell v. Clemens*, (1911) 28 T. L. R. 42 H. L. overruling (1911) 1 K. B. 984 C. A.

⁶ *Ibid.* per C. A.

⁷ *Heilgers v. Jaduball*, 16 C. 417.

⁸ *Brighty v. Norton*, (1842) 32 L. J. Q. B. 88.

⁹ Benjamin, 4th Ed. p. 716; but it was held that tender before the writ of suit was issued, although the writ had been applied for, was not too late. *Briggs v. Calverley*, 8 T. R. 629.

§ 295. promise is to pay immediately on demand.¹ Where demand is made by the creditor's agent, the debtor must have a reasonable opportunity of inquiring into the agent's authority.² If the seller does not attend at the place and time appointed, the buyer will not be in default.³

When seller does not attend.

§ 296. When there is no agreement as to the place of payment it is determined by section 49, the English Common Law rule, that a debtor must seek out his creditor does not apply to India.⁴ In an earlier case⁵ it was held to be where the payee resides, but this seems to be overruled.

Place for payment.

§ 297. In England⁶ payment by a stranger to the contract is not sufficient to discharge the debtor, unless it is made by the third party as agent for and on account of the debtor and with his prior authority or subsequent ratification.⁷ But in India under section 41 of the Contract Act⁸ such payment accepted in performance of the debtor's contract would be a discharge.

Payment by whom to be made.

By Stranger.

Unauthorised. It has been held that before ratification the stranger and the third party can agree to annul an unauthorised payment,⁹ but this depends on whether such payment is satisfaction without ratification.¹⁰ Under section 41 it seems the creditor, if he refunds, cannot sue the debtor. Pollock, however, takes the view that if the creditor did not

¹ *Toms v. Wilson*, (1862) 32 L. J. Q. B. 382; *Massey v. Sladen*, (1868) L. R. 4 Ex. 18, 38 L. J. Ex. 34.

² *Moore v. Shelley*, (1883) 8 A. C. 285 P. C.

³ *Thorn v. City Rice Mills*, (1889) 40 Ch. D. 357.

⁴ *Puttappa v. Virabhadrapa*, (1905) 7 Bom. L. R. 993 C. A.

⁵ *Motilal v. Surajmul*, (1904) 30 B. 167 O. C. cites *Robey v. Snaefell*, (1878) 20 Q. B. D. 152.

⁶ The same rule is well established in America, *Neily v. Jones*,

(1880) 16 West. Virg. 625.

⁷ *Simpson v. Eggington*, (1855) 10 Ex. 845, 24 L. J. Ex. 312, but see a contrary decision in *Crook v. Lister*, (1868) 13 C. B. N. S., p. 594, approved by Leake, 5th Ed., 647, Pollock 470, 32 L. J. C. P., p. 126. Ratification may be after suit filed, *Walter v. James*, (1871) L. R. 6 Ex. 124.

⁸ Cf. Neg. Ins. Act., 1881, s. 113.

⁹ *Walter v. James*, (1871) L. R. 6 Ex. 124.

¹⁰ See Benj. 5th Ed., p. 766.

know that the payment was unauthorised, he can annul it and sue his debtor, unless he is estopped by acquiescence after knowledge or originally accepted knowing the payment was unauthorised.¹

§ 297.

Of course an authorised agent can receive payment and discharge the debt. So a factor² presumably has authority to receive payment, but not a broker, for he is not entrusted with the goods.³ Stockbrokers seem to be excepted from this rule in England,⁴ and probably in India. So, too, persons with apparent authority, as shopmen, but only in the shop,⁵ or a person sitting in the creditor's counting house,⁶ or an agent, for instance, an assistant in a shop, having authority to sell goods, may be presumed to have authority to receive the price of those goods.⁷

§ 298.
Who may
receive
payment.

Shopmen.

An agent with authority to sell has apparent authority to receive payment in cash,⁸ but he must, generally speaking, take cash and not a bill⁹; and if the debtor writes off a debt due by the agent to him, that is not payment against the principal.¹⁰ It makes no difference if the agent is selling upon a *del credere* commission.¹¹ The mere printing on statements of accounts "cheques to be

Agent to sell.

¹ Indian C.A., 2nd Ed., 540, citing *Walter v. James*.

² *Hornby v. Lacy*, (1817) 6 M. & S. 166; *Fish v. Kempton*, (1849) 7 C. B. 687.

³ *Baring v. Corrie*, (1818) 2 B. & Ald. 137.

⁴ *Ex parte Cook*, (1876) 4 Ch. D. 123; Benjamin 4th Ed. 740.

⁵ *Kaye v. Brett*, (1851) 5 Ex. 269; *Jackson v. Jacob*, 5 Scott. 79.

⁶ *Barrett v. Deere*, (1828) Moo. & Mal. 200; *Willmott v. Smith*, (1828) M. & M. 238. 8 C. & P. 453.

⁷ *Narasimhulu Chetty v. Sundra Chariar*, (1910) 8 M. L. T. 7, citing *Chapel v. Thornton*, 33 R. R. 678; *Howard v. Chapman*,

34 R. R. 314.

⁸ *International Sponge Importers v. Andrew Watt*, (1911) A. C. 279 H. of L.; *Cuiterall v. Hindle*, 35 L. J. C. P. 161. reversed on another point L. R. 2 C. P. 868.

⁹ *Williams v. Evans*, (1866) 35 L. J. Q.B. 111 (auctioneer) as to taking a cheque, see *Thorold v. Smith*, 11 Mod. 87, *Bridges v. Garrett*, L. R. 4 C. P. 580 L. R. 5 C. R. 451, as to cases in which an agent may receive a bill in payment, see *Hogarth v. Wherley*, L. R. 10 C. P. 680.

¹⁰ Benjamin, 4th Edn, p. 743.

¹¹ Story on 'Agency,' § 98.

§ 298. crossed on account payees" is not sufficient notice
Travellers. that travellers of a wholesale firm cannot take cash
 payment.¹

Where for four years cash payments and cheques in favour of a firm's traveller had been unchallenged, it was said the firm could not afterwards, on discovering defalcations on the part of their traveller, claim a second payment.¹

Solicitor's clerk. So a tender to a clerk in the office of the solicitor to whom the debt was due, was held valid, though he refused to take it on the ground that he had no instructions as that was held not to amount to a disclaimer of his authority to receive.²

As to auctioneers *see* para. 1049. A wife has no general authority to receive payment on behalf of her husband. She can receive payment on her own account.

When agent has a lien. Payment cannot be made to the principal so as to defeat the agent's lien—as a solicitor's,³ a broker's, or an auctioneer's: such payment is no defence to an action by such agent for the price unless it be shown that his lien has been satisfied.⁴

§ 299. The contract may show that although the property has
Payment depending on delivery. passed, payment of the price or part of it is conditional on delivery.⁵ For the parties may make what contract they please; the presumption is that if the property has passed, the buyer must pay whether he actually receives the goods or not, and he is in the same position if he has consented to take the risk of delivery.⁶

¹ *International Sponge Importers v. Wall*, (1911) A. C. 279.

² *Finch v. Boning*, (1879) 4 C. P. D. 143; *Bingham v. Allport*, (1833) 1 N. & M. 398.

³ *Cf.* compromises to defeat lien for costs or with notice of lien. 25 C. 887, 30 B. 27, 7 Bom. L. R. 547.

⁴ *Robinson v. Rutter*, (1855) 24 L. J. Q. B. 250; *Grice v. Kendrick*, (1870) L. R. 5 Q. B. 340.

⁵ *Dupont v. British South Africa*, (1902) 18 T. L. R. 24 O. C. *see* § 158; *Calcutta Co. v. De Matlos*, (1868) 32 L. J. Q. B. 322.

⁶ *Stock v. Inglis*, (1882) 10 App. Cas. 263.

Where a bill of exchange or promissory note is received in payment it operates immediately as payment,¹ but it is generally only conditional payment,² and the seller's right to the price revives on the non-payment³ of the security.⁴ But it may be given and accepted in complete satisfaction and discharge of the price, and the effect of the transaction is a question of fact depending on the actual agreement between the parties.⁵

§ 300.
Payment by negotiable instrument.

The onus of showing that it was taken in satisfaction of the debt lies on the party asserting it.⁶ This must be clearly shown and will not be inferred from ambiguous words,⁷ such as that a bill was taken in payment⁸ or in discharge⁹ or in settlement.⁶ A request to send not legal currency, but a cheque or other negotiable instrument does not imply that it is to be anything but conditional payment.¹⁰

Onus of proving in satisfaction.

The taking of a negotiable instruments amounts to payment in the following cases :—

§ 301.
When payment by bill is absolute.

1. Where there is an agreement express or to be inferred to that effect.

By agreement.

¹ *Currie v. Misa*, L. R. 10 C. P. p. 163; *Ex parte Matthew*, (1884) 12 Q. B. D. 506.

Royle, (1880) 5 C. P. D. 354; *Day v. McLea*, (1886) 56 L. J. Q. B. 293.

² *Culltanji v. Raghowji*, (1904) 30 B., p. 35.

⁶ *Re Romer*, (1893) 2 Q. B. 286 C.A; *Jambu v. Palaniappa*, (1902) 26 M. 526; *Yarlagudda v. Gorantle*, (1905) 29 M. 111.

³ *Kuttayan v. Palaniappa*, (1903) 27 M. 540, but only if it is in his hands or has not been negotiated; *Dargavarapu v. Rampratap* 25 M. 590; *Banarsi v. Fazal*, 28 A. 298; § 307.

⁷ *Robinson v. Read*, (1829) 7 L. J. K. B. 236; *Gunn v. Bolckow*, (1875) L. R. 10 Ch. 491, 44 L. J. Ch. 732.

⁴ A cheque crossed not negotiable is, it seems, within this rule: *Benj.* 5th Ed. 781 n 5.

⁸ *Maillard v. Duke of Argyle*, (1843) 6 M. & G. 40.

⁵ *Sayer v. Wagstaff*, (1842) 5 Beav. 415; *Sibree v. Tripp*, (1846) 15 M. & W. 23; *Burliner v.*

⁹ *Kemp v. Watt*, (1846) 15 M. & W. 672.

¹⁰ *Kedarmal v. Surajmal*, (1907) 9 Bom. L. R. p. 911.

§ 301.
Without
recourse.

2. When the seller has negotiated the bill or note without recourse.¹
3. Where the buyer has given a bill or note in payment to which he is not a party and the seller cannot show that he used due diligence in taking all necessary steps to obtain payment, and to preserve the rights of the buyer against all parties thereto who were liable for its payment to the buyer when he passed it to the seller.²

Similarly, where a cheque is given, the seller must present it within a reasonable time, otherwise it will operate as absolute payment.³

What
amounts to
agreement
to make a
bill absolute
payment.

If the buyer offer to pay in cash and the seller takes a negotiable security in preference, the security is deemed to be taken as an absolute, and not a conditional payment.⁴

So when a seller elected to take a bill at 6 months in preference to cash less discount, the Privy Council held this to be payment in substance, making it the duty of the seller to give up the ship's receipts for the goods and thus depriving him of his right to stop in transit.⁵ But this does not apply to a case where the seller prefers a cheque.⁶

§ 302.
Seller may
make a bill
or note.

If the buyer has endorsed to the seller on account of the price a bill or note accepted or made by third parties, the seller may make the bill or note, *i.e.* render it equivalent

¹ Negotiable Instruments Act s. 35, 52, Benj. 5th Ed. p. 829, see *Read v. Hutchinson*, (1813) 3 Camp. 352, where it was said that payment by a bill without recourse amounted to barter.

² *Camidge v. Allenby*, (1827) 6 B. & C. 373 (country bank notes); see Benj. 5th Ed. 785, for numerous other cases, see para. 302.

³ *Hopkins v. Ware*, (1869) L. R. 4 Ex. 268; see Negotiable Instru-

ments Act s. 64; see para. 303.

⁴ *Anderson v. Hilliss*, (1852) 21 L. J. C. P. 150; *Guardians of Lichfield v. Green*, (1857) 26 L. J. Ex. 140.

⁵ *Cowasjee v. Thompson*, (1845) 5 Moo. P. C. 165.

⁶ *Everett v. Collins*, (1810) 2 Camp. 515; *Smith v. Ferrard*, (1827) 7 B. & C. p. 24; *Caine v. Coulson*, (1863) 82 L. J. Ex. 97; cf. *Cohen v. Hale*, (1878) 3 Q. B. D. 371.

to payment by his own laches, as by allowing the drawee § 302.
more than twenty-four hours in which to accept,¹ or by
omitting to make due presentation thereof for payment,²
or to give due notice of dishonour,³ or by altering the
instrument in a material point so as to destroy the buyer's
rights against antecedent parties.⁴ This last does not
apply where the buyer is primarily liable.⁵

In India under the Negotiable Instruments Act⁶ when § 303.
the holder of a cheque failed to present it for payment **Failure to**
within a reasonable time⁷ and the drawer thereof sustained **present a**
loss or damage from such failure he was discharged from **cheque.**
liability to the holder. This was the rule at Common
Law⁸ and the holder lost his remedy on the cheque even
if the drawer obtained a dividend from the banker's
trustee in bankruptcy.⁹ If the drawer suffered no damage
he was not discharged from his liability until the claim
on the cheque was barred.¹⁰ In England a new rule has
been enacted by the Bills of Exchange Act, section 74
(1) and (3), and the drawer is discharged to the extent
of his actual loss and the holder has a claim against
the banker to the extent of the drawer's discharge.
The Indian rule was amended accordingly by Act VI of
1897, section 3.

It is impossible according to Benjamin to lay down § 304.
definite rules as to when a buyer who has made conditional **When**
payment by a negotiable instrument to which he is not **notice of**
dishonour
necessary.

¹ Neg. Ins. Act, s. 83.

² *Ibid.*, s. 84; as to what
amounts to presenting a foreign
cheque, see *Heywood v. Pickering*,
L.R. 9 Q. B. 428.

³ *Ibid.*, Ch. VIII and IX; *Smith*
v. Mercer, (1867) 37 L. J. Ex.
24; *Peacock v. Russell*, (1862) 32
L. J. C. P. 266; *Camidge v.*
Allenby, (1827) 6 B. & C. 378.

⁴ *Ibid.*, s. 87; *Alderson v. Lang-*
dale, 3 B. & Ad. 660.

⁵ *Atkinson v. Hawdon*, 2 A. & E.
628.

⁶ Section 84 of Act XXVI of
1881.

⁷ Section 105.

⁸ *Hopkins v. Ware*, (1869) L. R.
4 Ex. 268.

⁹ *Alexander v. Burchfield*,
(1842) 7 M. & G., 1061; *Baily v.*
Bodenham, (1864) 33 L. J. C. P.
252.

¹⁰ *Laws v. Rand*, (1857) 27 L. J.
C. P. 76.

a party, and of which he is not the holder, will be discharged from liability for the price unless he receives due notice of dishonour.¹

§ 305.
Payment by
negotiable
instrument
valid until
defeasance.

Payment by
worthless
bills.

Where the payment is to be by negotiable instrument payment takes effect from the delivery of the instrument² if it is duly paid³ but is defeated by the happening of the condition, *i.e.*, non-payment at maturity.⁴

If a cheque is given which the buyer has no reasonable ground to believe will be paid, it is fraud and no property passes;⁵ but a payment by bill known to be worthless will not render a contract void unless it was given for the express purpose of getting possession of the goods⁶: and if such bill is without recourse no action lies for the price but only for trover or deceit.⁷

Effect of
absolute
payment
by bill.

Whenever it can be shown that it was the intention of the parties that a bill or note should operate as absolute payment, then the buyer will no longer be indebted for the price of the goods, although he may be responsible on the security.⁸

§ 306.
Refusal
to give bill
or note.

When payment is to be made by bill or note or partly in cash and partly by bill, and the buyer refuses to give either, an immediate action for the price will not lie, for the buyer is entitled to credit.⁹ But if the giving

¹ 5th Ed. p. 787; see Byles on 'Bills' 16th Ed. 242, 243; and for Indian Law Neg. Inst. Act, Ch. 8, ss. 91-98; see *Kuttayan v. Palaniappa*, (1903) 27 M. 540; *Dargavarapu v. Rampratap*, (1901) 25 M. p. 583.

² *Currie v. Misa*, (1875) L. R. 10 Ex. P. 163; *Felix v. Hadley*, (1898) 2 Ch. 680.

³ *Felix v. Hadley*, (1898) 2 Ch. 680.

⁴ *Belshaw v. Bush*, (1851) 11 C. B. 191, 22 L. J. C. P. 24; *Turney v. Dodwell*, (1854) 23 L. J. Q. B. 187; *Ex parte Matthew*, (1884) 12 Q. B. D. 506 C. A.

⁵ *Hawse v. Crowe*, (1826) R. & M. 414; *Loughton v. Barry*, Ir. R. 6 C. L. 457.

⁶ *Noble v. Adams*, (1816) 7 Taunt. 59, 17 R. R. 445.

⁷ *Read v. Hutchinson*, (1813) 3 Camp. 352.

⁸ *Lichfield Union v. Green*, (1857) 26 L. J. Ex. 140; *Sibree v. Tripp*, (1816) 15 M. & W. 23.

⁹ *Rabe v. Otto*, (1904) 20 T.L.R. 27; *Hoskins v. Duperoy*, (1808) 9 East. 498. In England the seller may make a special claim before the due date of the bill or note. *Rabe v. Otto*, (1904) 89 L. T. 562; *Paul v. Dod*, (1846) 2 C. B. 800, 15 L. J. C. P. 177; *Mussen v. Price*, (1808) 4 East. 147, but see *Bartholomew v. Markaick*, (1863) 33 L. J. C. P. 145, where the contract was repudiated.

of a bill or note be the condition to credit being allowed at all,¹ as, *e.g.* where goods are sold cash with option of bill,² if it is not given the seller may sue at once for the price. Or of course he may wait until the credit expires and then sue for the price.

On the non-fulfilment of the condition, that is the non-payment or dishonour of the instrument, the seller's original remedy revives, but if the seller has negotiated it he cannot, without accounting for it, bring his action for the price, as his debtor having by the endorsement been rendered liable to a third person, cannot be sued by the original creditor.³ For where a bill or note has been given and the seller sues for the price and alleges that the note or bill has not been paid he must account for the security, otherwise the buyer might have to pay twice.⁴ This rule has been so strictly applied that where a seller sued for the price of goods paid for by a bill, and the bill was at the time of commencing the action in the hands of a third party, although at the hearing it was in the seller's possession, he was non-suited.⁵ But Benjamin⁶ doubts this case⁵: for there is direct authority to the contrary,⁷ and it has been held that where a bill was in the hands of the buyer, the seller might without producing the bill, recover on the original consideration.⁸ Neither of these cases were cited in *Davis v. Reilly*. But the rule seems to be that if a bill, negotiable in form, is negotiated no

§ 307.
Seller must
account for
security.

¹ *Nickson v. Jepson*, (1817) 2 Stark. 227.

² *Rugg v. Weir*, (1864) 16 C. B. N. S. 471; see also *Dutton v. Solomonson*, (1803) 3 B. & P., 582, 7 R. R. 883; *Helps v. Winterbottom*, (1831) 2 B. & Ad. 431; *Wayne v. Morewood*, (1877) 46 L. J. Q. B. 748.

³ *Dargavarapu v. Rampratap*, (1901) 25 M. 580; *Banarsi v. Fazal*,

28 A. 298.

⁴ *Price v. Price*, (1847) 16 M. & W. 232.

⁵ *Davis v. Reilly*, (1898) 1 Q. B. 1.

⁶ 5th Ed. p. 784.

⁷ *Burden v. Halton*, (1828) 4 Bing. 454.

⁸ *Widders v. Gorton*, (1857) 1 C. B. N. S. 576.

§ 307. suit on the original contract lies until it is obtained back ¹ ; but it is otherwise if it is not negotiable.²

Buyer primarily liable.

Where the buyer is primarily liable of course the seller must show that the bill or note was dishonoured, except in the case of the buyer's insolvency ; and where the buyer is not primarily liable on the bill or note, he must show dishonour and, where necessary, notice thereof to the buyer.³

§ 308.
Sending half notes.

Sending half a bank note with the intention of sending the other half is an inchoate act, and does not amount to payment.³

As to the position where there is a running account between the parties, *see* para. 372 ; and as to the effect of taking security, *see* paras. 347, 373.

§ 309.
Payment by other methods.

A set-off in an account stated is payment,⁴ but this does not apply to ordinary current accounts with no agreement to set off the items.⁵ A debtor when paying may set off any liquidated claim that he has against his creditor although not arising out of the same transaction, and by exercising such a right a tender is not rendered invalid.⁶

§ 310.
Payment of less than due in satisfaction.

In India the highly technical English and American rule ⁷ that payment of a less sum on the due date cannot be satisfaction for a larger sum, finds no place.⁸

§ 311.
What the buyer has to pay.

The buyer is not only bound to pay the price, but also any duty imposed after the contract and before delivery.

The Law in India as to a duty imposed on goods subsequently to a contract to deliver, is provided for by Act VIII

¹ *In re a debtor*, (1908) 1 K. B. 344, 350 C. A. where it was held the right to sue was suspended until a negotiated bill was obtained back ; *see* p. 283, *n.* 3. But the onus of accounting for the note is on the plaintiff, not on the defendant as held in *Dargavarapu v. Rampatapu*, (1901) 25 M. p. 583; *Ramuz v. Croce*, (1847) 1 Ex. 167.

² *Price v. Price*, (1847) 16 M. & W. 232.

³ *Smith v. Mundy*, (1860) 3 E. & E. 22 ; *Kote v. The Official Assignee*, 33 M. 196.

⁴ Contract Act s. 50 Illus. (b) ;

Livingston v. Whiting, (1850) 19 L. J. Q. B. 528 ; *McKellar v. Wallace*, (1853) 8 Moo. P. C. 378.

⁵ *Cottam v. Partridge*, (1842) 4 M. & G. 271.

⁶ *Shipton v. Casson*, (1826) 4 L. J. K. B. 199 ; *see* § 313.

⁷ *Foakes v. Beer*, (1884) 9 A. C. 605, Lords Blackburn, Selbourne and Fitzgerald disapproving.

⁸ Contract Act s. 63 ; *Manohur Koyal v. Thakur Das*, (1888) 15 C. 319, 326 ; *Davis v. Candasami*, (1896) 19 M. 398, 402 ; *Naoroji v. Kazi Sidick*, (1896) 20 B. 636, 644.

of 1894, section XI.¹ The seller is entitled to add the duty payable to the price. It seems that the seller is entitled to exercise his rights of lien or stoppage in respect of sums payable as duty. There is a similar law in England, and it has been held that the seller can add new duties to the price, although an action relating to the price of the goods was pending at the time when the Act imposing the duties was passed.² But the rule under the Finance Act of 1900 only applies to sales mutually binding before the Act was passed.³ It was held in England under the special terms of section 3 of the Finance Act of 1901, imposing a duty on coal, that where a buyer purchased before the Act for a specific price, but did not apply for delivery until after the Act, that the seller was liable, in the first instance under a F.O.B. contract, to pay the duty, but in absence of an agreement to the contrary could recover the amount so paid from the purchaser.⁴ In England by the Customs Laws Consolidation Act 1876,⁵ when any increase, decrease or repeal takes place after the making of a contract of sale or delivery of goods duty paid, the seller may add such to the cost or the buyer may deduct it. The duty is chargeable on the date of actual removal from a warehouse.⁶ When the buyer has to pay duties, discount is only to be deducted from the amount payable to the seller.⁷

Lien for new duties.

F.O.B.

Increased customs duty.

Discount.

As to the debtor's right to appropriate payments, see Contract Act ss. 59, 60 and 61.

§ 312. Appropriation of payments.

¹ *Thikamlal v. Kalidas*, (1896) 21 B. 628. (Where a new duty imposed on yarn and actually paid on it was added to the price of dhotars made therefrom.)

L. T. 453.

² See *Conway v. Mulhern*, (1901) 17 T. L. R. 730.

⁴ *Insole v. Gueret*, (1906) 22 T. L. R. 344, affirmed 23 T. L. R. 294 C. A ; but see *contra*, *Bowhill v. Tobias* 5 F. 252.

⁵ 38 & 39 Vict. (3), 20.

⁶ 63 Vict. C. 7 s. 9.

³ *Newbridge Rhondda Co. v. Evans*, (1902) 18 T. L. R. 396, 86

⁷ *Smith v. Blandy*, (1825) R. & M. 260.

§ 313. A valid tender of payment is equivalent to actual payment and defeats the seller's rights qua unpaid seller.¹
Tender is equivalent to payment.

English rules not in force. The English rules of tender are exceedingly rigid and the framers of the Indian Contract Act appear to have thought that less rigid rules would suffice in India. Section 38¹ seems substantially to require that there should be a genuine and unconditional offer in the case of payment, to pay unconditionally at a proper place, and made by a person in a position to pay.² An offer of big currency notes was held sufficient.³ The view taken in a Bombay case was that the English and Indian law were the same, but the point under discussion was the right of inspection.³

Tender of big notes.

The general rule is inspected payment against inspected goods.⁴

§ 314. It seems sufficiently clear from the terms of section 38 and the case of *Kanye Lall v Khettermoney*⁵ that the English rules⁶ as to the necessity in every case of actually producing the money before the eyes of the creditor unless that is expressly waived, do not apply in India, but a *bona fide* offer of payment will suffice. The creditor, however, must have reasonable opportunity of examining and counting the money,⁶ if he so desires, but an offer to pay if refused is not bad because the money was not displayed before the creditor, but the buyer must show that it was a genuine offer and capable of performance.⁷
No need to produce money.

Where the plaintiff tendered money for bills of lading to a party having a special property in them owing to his lien thereon, and was met with a request for a day's

¹ Contract Act s. 38.

² Per Wilson J., *Kanye Lall v. Khettermoney*, 5 C. L. R. 105; see reference by Board of Revenue 3 A. p. 798, set out § 120.

³ *Ruttonsey v. Jamandas*, (1882) 6 B. 692.

⁴ *Biddell v. Clemens*, (1911) 1

K. B. p. 949 C. A. rev. 28 L. T. 42.

⁵ Benjamin 4th Ed. p. 720.

⁶ Section 38 (2); see *Isherwood v. Whitmore*, (1848) 11 M. & W. 347; *Biddell v. Clemens*, (1911)

1 K. B. p. 949 C. A.

⁷ *Shriram v. Madangopal*, (1903) 30 C. 865 P. C.

delay before accepting it, owing to the accidental mislaying of the documents, this was held not to amount to a tender and refusal of payment, and did not discharge the plaintiff from his duty to pay the bills before his right to the possession of the cargo attached.¹ The fact was that the plaintiff after the tender did not and could not pay the money due. Further he had agreed to pay on the next day.

It seems clear that if the first tender of the price is rejected as defective, the buyer can make a second tender if he complies with the terms express or implied of the contract. The principle is the same as where the seller makes a second tender of goods.²

Second tender.

A mere offer by letter to pay is not a tender.³

Offer by letter.

Nor need the seller accept a cheque in payment⁴ though waiver of any right to object thereto is readily inferred.⁴

Cheque.

A tender must be made in the current coin of the country⁵ unless otherwise agreed. But the Courts will readily infer a waiver of objection to the kind of money offered if the debtor offers current money of any sort,⁶ as an offer of currency notes of a distant circle,⁷ or where a payment is made in rupees for goods priced in sterling.⁸

§ 315.
Must be in current coin.

A tender must be of the whole price due,⁹ subject to any available set off.¹⁰ A tender of part is ineffective,

§ 316.
Must be of whole price.

¹ *Jenkyns v. Brown*, (1849) 19 L. J. Q. B. 286.

² See § 172.

³ *Kamaya Naik v. Devapa*, (1896) 22 B. 440.

⁴ *Bolye Chund Singh v. Moulard*, (1878) 4 C. 572.

⁵ Indian Coinage Act XXXIII of 1870 amended by Act VIII of 1893, and Act III of 1906 and Act XXII of 1899 ss. 12-14 and as to currency notes : Paper Currency

Act XX of 1822 s. 16 amended by Act VI of 1903 s. 2.

⁶ Benjamin 4th Ed. p. 728.

⁷ Cf. *Polyglass v. Oliver*, (1831) 2 Cr. & J. 15 (offer of county bank notes).

⁸ *Lilladhar v. Wreford*, (1892) 17 B. 62.

⁹ Unless the contract allows otherwise see under "Instalment Contracts."

¹⁰ See § 318.

unless it is made for and appropriated to separate severable items,¹ when it will be a bar to an action *quoad* its amount, and not merely a bar to damages.² But otherwise a tender of part will not stop interest running on the amount tendered.³

**§ 317.
Of too
much.**

A tender of too much money has been held good in England,⁴ but it was held in the earlier cases not if change is demanded,⁵ an opposite view was taken in 1824,⁶ and this view was taken in India also.⁷

**§ 318.
Right to
set-off.**

In tendering the buyer is entitled to deduct any sum due on a set-off,⁸ but if the amount due is reduced to the sum tendered by a set-off subsequently accruing due, that will not make the tender a good one.⁹

**§ 319.
Time and
place.**

Where a thing is to be done anywhere, a tender during the usual business hours is necessary.¹⁰ When the thing is to be done at a particular place and where the law implies a duty on the party to whom a thing is to be done to attend, that attendance is to be during the usual business hours.¹⁰

¹ *Hardingam v. Allen*, (1848) 5 C.B. 798; *Dixon v. Clarke*, (1848) 5 C.B. 365.

² *James v. Vane*, (1860) 29 L.J. Q.B. 169; *Bullen & Leake*, 3rd Ed. 694; but to be effective it must be paid into Court, *see* § 325; *Chapman v. Hicks*, (1834) 2 Cr. & Mee. 633.

³ *Watson v. Dhonendra Chunder Mookerjee*, (1877) 3 C. 6, 16; *Chunder Caunt Mookerjee v. Jodoo-nath Khan*, (1878) 3 C. 468; *Behari Lal v. Ram Ghulam*, (1902) 24 A. 461; *Haji Abdul Rahman v. Haji Noor Mahomed*, (1891) 16 B. 141, 147-149, is unsound; see *Dixon v. Clarke* *supra*; *Searles v. Sadgrave*, (1855) 5 E. & B. 689.

⁴ *Bevans v. Rees*, (1839) 5 M. & W. 306.

⁵ *Benjamin* 4th Ed. p. 724.

⁶ *Tadman v. Lubbock*, (1824) 1 C. & P. 366 n.

⁷ *Kanye Lall v. Khellermoney*, (1879) 5 C.L.R. 105.

⁸ *Searles v. Sadgrave*, (1855) 25 L.J. Q.B. 15 (if a suit is brought the balance should be paid into Court and a set-off pleaded.)

⁹ *Colton v. Goodwin*, (1840) 7 M. & W. 147.

¹⁰ *See* Contract Act ss. 38, 46. The old rules laid down in England have been abrogated. *see Startup v. McDonald*, (1844) 6 M. & G. 593, followed in India. before the Act in *Karticknath v. Government*, (1869) 11 W. R. 58.

It is no excuse for a European that the only available day **Sunday.** was a Sunday,¹ provided there are usual business hours within section 47.

A tender before the due date is invalid.²

If the promisee has the right to fix the place for **Place.** delivery on payment under the contract, section 49 and not section 94 applies, and the right must be reasonably exercised.³

In the absence of agreement the place for tendering goods is fixed by section 94, and for tendering money by section 49,⁴ which excludes the Common Law rule that the debtor must seek out his creditor.⁵ Section 49 does not apply if payment is to be made on demand.⁶ In Bombay *pakky adal* contracts have special rules.⁷

One of the conditions of a tender is that it must be made to the principal whose business it is to consider it, or to his authorised agent, and a tender made to a person who disclaims authority to recover it is made at the tenderer's peril.⁸

**§ 320.
To whom to
be made.**

It was held there where there is no person entitled to recover the money due, an offer to deposit the amount due with third parties is sufficient tender to stop interest.⁹

**Where no
one entitled
to recover.**

A tender must be unconditional, or at all events free from any condition to which the creditor may rightfully object. The debtor cannot demand an admission that

**§ 321.
Must be
uncondi-
tional.**

¹ *Lalchand v. Kerston*, (1890) 15 B. 338.

² *Eshahuq Molla v. Abdul Bari*, (1904) 31 C. 183.

³ *Grenon v. Lachmi*, (1896) 24 C. 8 P. C.

⁴ The illustration to s. 49 is in conflict with s. 94 ; another instance of slipshod drafting.

⁵ *Patlappa v. Verabhadrapa*, (1905) 7 Bom. L. R. 993, the decision in *Motilal v. Surajmall*,

(1906) 30 B. p. 171 seems to have overlooked s. 49.

⁶ *Raman Cheltiyar v. Gopalachari*, (1908) 31 M. 223, 228.

⁷ *Kedarmal v. Surajmal*, (1908) 10 Bom. L. R. 1230.

⁸ *Per Jenkins C.J., Bai Ruttonbai v. Fraser Ice Factory*, (1907) 10 Bom. L. R. 203 A. C. 32 B. 521.

⁹ *Pandurang v. Dadabhoy*, (1902) 4 Bom. L. R. 453.

no more is due,¹ but the mere fact that the debtor contends that the amount tendered is all that is due does not make the tender bad² for that is what every tender tacitly implies, nor is a tender under protest defective.³

Whether a debtor could demand a receipt at Common Law was doubtful, but apparently he could;⁴ in India he is entitled to do so.⁵

§ 322.
When
available.

The defence of the tender consists in the defendant having been always ready and willing to pay the debt and having tendered it before action to the plaintiff who refused it.⁶ It must be made at a proper time and place.⁷ For in strictness the plea of tender is applicable only to cases where the party pleading it has never been guilty of any breach of his contract.⁸ It certainly cannot be made after the time fixed in the contract, if that is of the essence of the bargain,⁹ so as to defeat any rights that have accrued. But as a general rule tender before action is good,¹⁰ as a party cannot sue when the other party has offered all that he is entitled to. It will not avail after an action is brought, nor after a creditor has brought and discontinued another action for the same money.⁹

§ 323.
Not good
after pro-
per demand.

A plea of tender will fail if the plaintiff can show that at any time before or after tender, a proper demand for payment or performance was made by him and was

¹ *Mitchell v. King*, (1833) 6 C. & P. 237; *Bowen v. Owen*, (1847) 11 Q. B. 130; *French v. Miller*, (1848) 5 C. B. 428.

² *Henwood v. Oliver*, (1841) 1 Q. B. 409; *Bull v. Parker*, (1842) 12 L. J. Q. B. 93, *Jones v. Bridgeman*, (1878) 39 L. T. 500.

³ *Greenwood v. Sutcliffe*, (1892) 1 Ch. 1 C. A.

⁴ *Richardson v. Jackson*, (1841) 8 M. & W. 298.

⁵ Indian Stamp Act II of 1899 s. 30.

⁶ *Bullen & Leake Plead*, 3rd Ed. 693.

⁷ Section 38.

⁸ *Hume v. Peploe*, (1807) 8 East. 168.

⁹ *Poole v. Tumbidge*, (1837) 2 M. & W. 223, 226.

¹⁰ *Briggs v. Calverley*, (1800) 8 T. R. 629; *Smith v. Manners*, (1859) 28 L. J. C. P. 220.

not complied with.¹ After tender such demand must be made by a properly authorised agent or personally to defeat the plea of tender²; if made by an unauthorised person it cannot be ratified afterwards.³

A tender of a debt, if made in due time, is available as a defence whenever the demand is of a pecuniary nature and is reduced or reducible to a certainty.⁴ And it has been said, but on doubtful authority, that there may be a valid tender where the claim is upon a *quantum meruit*,⁵ but it is not available in a suit strictly to recover unliquidated damages.⁶

§ 324.
Effect of
tender.

A tender does not bar or extinguish a debt, for the debtor is still liable to pay it whenever he is required to do so. But it bars any claim for subsequent damages or interest, and in England entitles the defendant to judgment against the plaintiff for his costs,⁷ if the amount is paid into Court.⁷

Does not
extinguish
the debt.

A plea of tender in India also is no defence unless accompanied by payment into Court of the amount due.⁸

§ 325.
Money must
be paid into
Court.

The creditor in such case is entitled to a decree for the sum tendered, but not, it seems, for further interest.⁹

¹ *Bennet v. Parker*, (1867) Ir. (1834) 2 A. & E. 82, 83.
R. 2 C. L. 85; *Poole v. Tumbidge*, (1837) 2 M. & W. 223; *Cotton v. Goodwin*, (1840) 7 M. & W. 147; *Brandon v. Newington*, (1842) 3 Q. B. 915; *Hesketh v. Fawcett*, (1843) 11 M. & W. 356; *Dixon v. Clark*, (1848) 5 C. B. 365.

² *Dixon v. Clark*, supra; *Edwardes v. Yates*, (1826) Ry. & M. 360; *Coore v. Callaway*, (1794) 1 Esp. 115; *Cowes v. Bell*, (1809) 1 Camp. 78 n.

³ *Dean v. James*, (1833) 4 B. & Ad. 546.

⁴ *Davys v. Richardson*, (1888) 21 Q. B. D. 202 C.A.

⁵ *Johnson v. Lancaster*, (1728) Str. 576; see *Dearle v. Barrett*,

⁶ *Dearle v. Barrett*, (1824) 2 A. & E. 82; *Davys v. Richardson*, (1888) 21 Q. B. D. 202 C. A.

⁷ *Dixon v. Clark*, (1848) 5 C.B. 365, 377; *Griffiths v. Ystradyfogwg*, (1890) 24 Q. B. D. 307.

⁸ *Haji Abdul v. Haji Noor Mahomed*, 16 B. 141; *Behari Lal v. Ram Ghulam*, 24 All. 461. In the early case of *Bolye Chund Singh v. Moulard*, (1878) 4 C. 572, it was said that generally on a plea of tender the defendant would not be entitled to costs unless the tender were followed by payment into Court.

⁹ *Trimbak Jivaji v. Sakharam*, 16 B. 599.

CHAPTER XII.

Rights and Remedies of the Seller.

§ 326.
Where the
property
has not
passed.

Damages for
non-accept-
ance.

Date for
assessment.

Where the property has not passed in the goods, the seller's only remedy for a breach of a contract to accept and pay for goods, is, as a general rule,¹ a suit for damages and not for the full price,² for the goods are still his.

The presumptive measure of damages for the breach of an executory contract is the difference between the contract price and the market price when the contract is broken, *i.e.* on the due date which is the last day on which delivery can be made^{3,4}: for the seller can take his goods into the market and sell them,⁵ and the purchaser having the money in his hands may go into the market and buy. But this rule is only presumptive, and the damages are always the loss incurred as calculated under section 73.⁶

The date of breach is *prima facie* the date or dates under an instalment contract,⁷ appointed for performance. Even if the contract is repudiated⁸ or the buyer becomes insolvent⁹ before that date, the measure of damages is the same,⁷ except that in England if the repudiation is

¹ He can sue for the price in some cases; see s. 49 (2) S. of G. Act. *Gour Shah*, Marsh. 542; *Cohen v. Cassin Nash* I.C. 264, and see § 650.

² *Boswell v. Kilborn*, (1862) 15 Moo. P. C. 309.

⁵ *Barrow v. Arnaud*, (1846) 8 Q. B. 604; *Boswell v. Kilborn*, (1862) 15 Moo. P. C. C. 309.

³ *Leigh v. Paterson*, (1818) 2 Moo. 588; *Gainsford v. Carroll*, (1824) 2 B. & C. 624. Where on the last day a market rate prevailed up to 1 P.M., the plaintiff was allowed to recover at that rate, although a panchayat then fixed a lower rate which did not bind him: *Tara Chand v. Budh Ram*, 2 P. L. R. 1910, 6 Ind. Cas. 485.

⁶ See under para. 650.

⁷ *Krishna Jute Mills v. J. Innes*, 21 M. L. J. p. 189; *Kemp v. Bearselman*, (1906) 2 K. B. 608; *Jugohandas v. Nusserwanji*, (1901) 26 B. 744; *Mackertich v. Nobo Coomar*, (1903) 30 C. 477; *Cooverji Bhoja v. R. N. Mookerjee*, (1909) 36 C. 617.

⁸ See § 551.

⁴ Contract Act s. 73 illus. (i); *cf.* S. of G. Act s. 50 (3); *Sharman v.*

⁹ *Boorman v. Nash*, (1829) 9 B. & C. 145.

accepted, damages are reduced by any circumstances enabling, or which might have enabled, the party suing to mitigate¹ his loss²; but this does not apply if the repudiation is not accepted.³

Under the Contract Act, section 73, the promisor is in both cases bound to mitigate damages.⁴

Where no date is fixed for delivery, if the buyer gives notice that he will not accept, the date of receiving the notice is the due date,⁵ and if no notice is given the date for assessing damages is a reasonable time after the contract is made.⁶

If the time for the delivery is postponed by agreement the postponed date is the due date,⁷ or if no date is fixed a reasonable time after the postponement.⁸ But mere delay without a binding agreement to postpone delivery does not affect the due date.⁹ Nor is a buyer if he delays to demand delivery entitled to the benefit of a rise of market value after the due date.¹⁰

**§ 327.
Postponement of due date.**

As to the effect of insolvency of either party *see ante*.¹¹

But the parties may make the price payable on a fixed day irrespective of delivery, and if the price is not then paid the seller may sue for it although the property has not passed and although goods have not been appropriated to the contract; but the buyer has his cross-action

**§ 328.
Price payable irrespective of delivery.**

¹ *Roth v. Taysen*, (1896) 73 L. T. 628.

² *Frost v. Knight*, (1872) L. R. 7 Ex. 111.

³ *Boorman v. Nash*, (1829) 9 B. & C. 145; *Phillipotts v. Evans*, (1839) 5 M. & W. 475; *Boswell v. Kilborn*, (1862) 15 Moo. P.C. 309, *sed quere*; *see* § 652.

⁴ *See* § 652.

⁵ Contract Act s. 73 illus. (c).

⁶ *Mansuk Dass v. Rangayya*, (1863) 1 M. 162; *Ranga v. Rangu*

Chetti, *ibid.* 168.

⁷ *Ogle v. Vane*, (1868) L. R. 3 Q. B. 275, *Gladdstone v. Sewbux*, (1879) 4 C. L. R. 106; *Tyers v. Rosedale*, (1875) L. R. 10 Ex. 195.

⁸ *Hickman v. Haynes*, (1875) L. R. 10 C. P. 538.

⁹ *Jumohandaz v. Nusserwanji*, (1901) 26 B. 744.

¹⁰ *Re Voss*, (1873) L. R. 16 Eq. 155; *Plevins v. Downing*, (1876) 1 C. P. D. 220.

¹¹ *See* § 240.

for non-delivery, if delivery is not made,¹ and is not excused.

§ 329.
Where part
of goods
delivered.

Where an executory contract has been partially performed, the seller is entitled to consider the contract rescinded, may recover the value of goods actually delivered² and sue immediately on a repudiation of the contract.³ But in England he could not do so if the contract still subsisted.⁴

§ 330.
Quasi-lien
where
property
has not
passed.

Where the property has not passed to the buyer, the unpaid seller has, under the Sale of Goods Act,⁵ in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage in transit in cases where the property has passed. The cases at Common Law recognising this right were all cases in which the buyer was insolvent.⁶ Chalmers⁷ says, however, that section 39 (2) of the Sale of Goods Act is declaratory.⁸

For as no unpaid seller's lien can exist over goods in which the seller still has the property, a species of *quasi-lien* has been accorded to him.

Thus in *Ex parte Chalmers*,⁹ where goods were to be delivered by instalments at 14 days' credit, and the buyer became insolvent after one instalment had been delivered but not paid for, and another was due, it was held that the seller could refuse delivery of the last instalment until both had been paid for.

¹ S. of G. Act. 49 (2); *Laird v. Pim*, (1841) 7 M. & W. 474.

² Contract Act s. 65 illus. (b) s. 75.

³ *Bartholomew v. Markwick*, (1863) 38 L. J. C. P. 145.

⁴ *Wayne's Merthyr Coal Co. v. Morewood*, (1877) 46 L. J. Q. B. 746.

⁵ Cf. S. of G. Act. s. 39 (2); cf. s. 43.

⁶ Benjamin 5th Ed. p. 833.

⁷ 6th Ed. 84, citing *Ex parte Chalmers* (1873) 8 Ch. 289 (a case of insolvency); *Griffiths v. Perry*, (1859) 28 D. J. Q. B. 204, 208.

⁸ *Contra* Law Quarterly, April 1903 p. 118. Blackburn agrees with Chalmers, 3rd Ed. 510.

⁹ (1873) 8 Ch. 289; see *Morgan v. Bain*, (1874) L.R.10 C.P. 15.

There is no provision in the Contract Act for this, but the effect of insolvency will be to give a *quasi* lien ; but in the case of mere default the position is not so clear, but semble a *quasi* lien would arise.

In India.

A special right analogous to lien may be created by agreement or by the cause of dealing between the parties.¹

§ 331.
Analogous
right by
contract.

The rights of lien may be affected by usage.

Where the property has passed and the buyer refuses to take delivery or pay the price, the seller may bring an action for the price.³ The case is not specifically provided for by the Contract Act, but the Civil Procedure Code contemplates such a suit, and the Contract Act is far from exhaustive.⁴

§ 332.
Where the
property
has passed.
Suit for
price.

For the seller may recover the price of the goods either where the goods have been sold and delivered or where they have been bargained and sold. This last form of action is applicable where the property has passed, and the contract has been fulfilled in all respects except delivery, and delivery is not part of the consideration for the payment of the price, or a condition precedent to its payment⁵ as where payment is by agreement to be made irrespective of delivery,⁶ or where the condition of delivery has been waived by the buyer's refusal to take or receive delivery,⁷ or has been excused by the perishing of the goods which were at the buyer's risk.⁸

When the
seller may
sue for the
price.

¹ Benjamin 5th Ed. p. 844, *Dodsley v. Varley*, (1840) 12 A. & E. 682 ; see § 336.

² Benjamin 5th Ed. p. 835.

³ Cf. S. of G. Act 49 (1).

⁴ *P. R. & Co. v. Bhugwandas*, (1909) 11 Bom. L.R. 192 A.C. ; *Finlay Muir v. Radhakissen*, (1909) 36 C. ; see § 449 ; *Buchanan v. Avdall*, (1875) 15 B. L. R. p. 296 ; *Graham v. Jackson*, (1811)

14 cart. 498.

⁵ *Bullen & Leake*, 3rd Ed. 39 ; *Scott v. England*, (1844) 14 L. J. Q. B. 45.

⁶ Cf. S. of G. Act s. 49 (2).

⁷ *P. R. & Co. v. Bhugwandas*, (1909) 11 Bom. L. R. 192 C. A. ; *Finlay Muir v. Radhakissen*, (1909) 36 C. ; S. of G. Act s. 49 (1).

⁸ *Alexander v. Gardner*, (1835) 1 Bing. N. C. 671.

Discount. Where a seller sues for the price of goods discount may be allowable by the contract or by trade usage.¹

Decree for the price. The obtaining of a decree for the price does not divest the seller's lien,² and it seems that in such a decree unless the goods have perished, that execution should not issue unless the goods are tendered ; although where the price is recoverable independently of delivery the English Courts give a decree and leave the buyer to his ordinary remedies for non-delivery.³

Counter-claims. The buyer may and in India must,⁴ if he intends to make such a claim, claim damages for breach of any warranty as a defence in part⁵ or as to the whole⁶ of a suit for the price.

Where payment to be by bill or note. If payment is to be made by bill or note or partly in cash and partly by bill or the buyer has the option to give a bill for the price and the buyer gives nothing,⁷ the seller cannot generally⁸ sue for the price while the period for which the bill was to run lasts, for he has given credit⁹ ; but the contract may stipulate that credit is only to be given if the bill is accepted,¹⁰ and a failure to accept therefore gives an immediate right to sue for the price. But, though credit is given, an immediate action lies on the promise to give a bill¹¹ or note for the whole amount,¹² subject, it seems, to an allowance for interest for the period

¹ *Ex parte Worthington*, (1876) 3 Ch. D. 803, S. of G. Act s. 49.

² See p. 309.

³ *Dunlop v. Grole*, (1845) 2 C. & K. 158, S. of G. Act s. 49 (2).

⁴ Civ. Pro. Code, 1908, s. 11.

⁵ *Mondel v. Steel*, (1841) 8 M. & W. 858.

⁶ *Poulton v. Lattimore*, (1829) 9 B. & C. 259.

⁷ *Paul v. Dod*, (1846) 2 C. B. 800; *Mussen v. Price*, (1803) 4 East. 147; *Rabe v. Otto*, (1904) 89 L. T. 562.

⁸ He can, if the buyer abso-

lutely repudiates the contract *Bartholomew v. Markwick*, (1863) 15 C. B. N. S. 710, but see *Wayne's Merthyr Coal Co. v. Morewood*, (1877) 46 L. J. Q. B. 746.

⁹ *Hoskins v. Duperoy*, (1808) East. 498.

¹⁰ *Nickson v. Jepson*, (1817) 2 Stark. 227; *Rugg v. Weir*, (1864) 16 C. B. N. S. 471 (cash with option of bill.)

¹¹ *Mussen v. Price*, (1803) 4 East. 147.

¹² *Hutchinson v. Reid*, 3 Camp. 329.

of the bill.¹ After a bill, which has not been given, would have matured, the seller is entitled to interest on the price.²

§ 332.

The seller is not bound to sue for the price, he may resell under section 107³ or he may sue for damages⁴ which would be calculated as in a case where that was his only remedy.

If there has been delivery to the buyer, and the goods are not in transit, the seller has only a personal remedy against the buyer, his special remedies *qua* seller have gone. He cannot rescind the contract, unless there is a special term on that behalf.⁵

As to the effect of the buyer's bankruptcy before delivery see para. 240.

Claims for interest are regulated by the Interest Act.

Where the property in the goods has passed the position of an unpaid seller who is not entitled to put an end to the contract either because his consent was obtained by fraud or the like,⁶ or by virtue of some clause in the contract⁷ or in circumstances amounting to a repudiation thereof by the buyer,⁸ would have been unfortunate but for certain rights given to him. For the buyer has the right of possession and though that is defeasible on his insolvency or on his failure to pay in due time the seller cannot, except in the circumstances noted above, revest the property in himself. For mere delay in paying the

§ 333.
Special
rights of
the unpaid
seller.

¹ *Hanna v. Mills*, 21 Wond. 90 (Amer.)

² *Brooke v. White*, (1805) 1 B. & P.N.R. 380, *Dutton v Solomonson*, (1808) 3 B. & P. N. R. 582; and if given, after the due date interest is given: *Marshall v. Poole*, (1810) 13 East. 98; *Farr v. Ward*, (1837) 8 M & W. 25, but not in sales on credit, even if time of payment is fixed. *Williams v. French*, (1891) 65 L. T. 453, 61 L. J. Ch. 22.

³ See under that section.

⁴ *Maclean v. Dunn*, (1828) 4 Bieng. 722; *Boorman v. Nash* (1829) 9 B. & C. 145.

⁵ Contract Act s. 121, *cf.* S. of G. Act, s. 48 (1) (4); *Martindale v. Smith*, (1841) 1 Q.B. 389, for such an agreement see *Lamond v. Davall*, (1847) 9 Q. B. 1080.

⁶ See § § 498, 627.

⁷ See § 655.

⁸ See § 554.

§ 333. price¹ (unless it is such as to evince an intention to repudiate the contract²) or mere insolvency³ does not, apart from an agreement in that behalf,⁴ justify the seller in avoiding the contract. But as long as the buyer has not obtained actual delivery, the Law gives the unpaid seller certain rights, all of which are lost if the buyer obtains actual possession of the goods. An unpaid seller of goods the property in which has passed to the buyer has always been favoured by the law and his position is protected in three ways; while he retains possession of the goods he has, unless he has waived it a lien for the price; after he has parted with possession he may in certain cases stop the goods in transit to the buyer, and the Act gives him certain rights of resale.

§ 334.
Position
of seller
exercising
rights.

It seems to be established that in all three positions the right exceeds a mere lien,⁵ (which would only entitle the seller to retain the goods until he had been paid for them, and would not enable him to confer any title on a third party either by way of sale or pledge,⁶) that is to say the seller's rights interfere not only with the buyer's right to possession but also with his right of property: but he cannot treat the contract as rescinded so as to resume the property.⁷ The exact extent of the seller's right at Common Law between these limits is very much a matter of conjecture. This right cannot be attributed to the effect of the agreement of the parties in the contract of sale. The extent of the right is not of much importance in India as section 107 gives a right of resale if certain conditions are fulfilled. If a resale does not comply with such conditions the question does arise and is discussed under that section

¹ *Martindale v. Smith*, (1841) 1 Q. B. 389, 395.

² *Lamond v. Davall*, (1847) 9 Q. B. 1030.

³ See § 240.

⁴ Contract Act s. 55 which modifies s. 39; cf. S. of G. Act s. 48 (1) (4).

⁵ See Benjamin 5th Ed. p. 821.

⁶ *Thames Iron Works v. Patent Derrich Co.*, (1859) 29 L. J. Ch. 714; *Scott v. Newington* 1. Moo. & Rob. 252.

⁷ See Blackburn 3rd Ed. p. 482.

The first of these rights is lien. The rule of law is that in a sale of goods where nothing is specified as to delivery or payment, the vendor, when the goods have not yet left his actual possession, including in that term any possession over which he has control, has the right to retain the goods until payment of the price : ¹ he has in all cases at least a lien unless he has waived it. The reason is stated by Benjamin² to be that he is presumed to contract, unless the contrary is expressed, on the condition and understanding that he is to receive his money when he parts with his goods.

§ 335.
Lien.

Reason for
lien.

There are cases in which the unpaid seller may have a quasi lien, although delivery has been made to the buyer,³ but these are not within the Contract Act. Such a right arises out of an agreement express or implied from the course of dealing. In America it was said a special interest is thus created like a charge on the property.⁴ But in *Howes v. Ball*⁵ it was held that it at most operated as a personal license from the purchaser without giving any right of property or possession.

§ 336.
Quasi-lien
apart from
possession.

Seller's Lien.

Unless a contrary intention appears by the contract, a seller has a lien in sold goods as long as they remain in his possession and the price, or any part of it, remains unpaid.

§ 95.
Seller's
lien.

A lien in general may be defined to be a right of retaining property until a debt due to the person retaining it has been satisfied.⁶ It gives of itself no right of resale.

§ 337.
Lien
defined.

¹ *Miles v. Gorton*, (1834) 2 C. & M. 504.

² See 5th Ed. p. 819.

³ See *Dodsley v. Varley*, (1840) 12 A. & E. 632.

⁴ *Gregory v. Morris*, (1877) 96 U. S. 619.

⁵ *Howes v. Ball*, (1827) 7 B. & C. 481 (an attempt to hypothecate goods which is not allowed by English law) considered in *Sewell v. Burdick*, (1884) 10 A. C. 74, 96.

⁶ *Hammonds v. Barclay*, (1802) 2 East. 235.

Personal
right not
transferable.

It is a personal right¹ and cannot be transferred² or parted with so as to confer title on a third party by way of pledge³ or sale.⁴ Thus a creditor of an unpaid seller cannot enforce the unpaid seller's lien.⁵

Property
must have
passed.

The idea of lien presupposes that the property in the goods is with the buyer, and the right to possession, subject only to payment, is an incident of the property in the goods and in all cases of lien is with the buyer.⁶

§ 338.
Meaning of
unpaid
seller's
Lien.

The term lien in respect of an unpaid seller is unfortunate, because the seller's rights arising out of his original ownership in all cases exceed a mere lien. They perhaps come nearer to the rights of a pawnee with a power of sale than to any other common law rights.⁷

Origin of the
right.

The origin of the right in English law is doubtful. It is probably founded on the custom of merchants.⁸

§ 339.
Indian and
English law
similar.

The Indian law is similar to the English. The seller's right to a lien can only arise when the property in the goods has passed to the buyer, and the expression in the Sale of Goods Act⁹ "notwithstanding that the property in the goods may have passed to the buyer" is misleading.

§ 340.
Essentials.

There are three essentials before the right can exist: (1) The goods must be in the possession of the seller or under his control. (2) The price or part of it must be unpaid. (3) The property in the goods must have passed to the buyer, and there must be no contrary intention

¹ *Legg v. Evans*, (1840) 6 M. & W. 42; *Donald v. Suckling*, (1866) 35 L. J. Q. B. 232.

² *Daubigny v. Duval*, (1794) 5 T. R. p. 606; *McCombie v. Davies*, (1805) 7 East. p. 6.

³ Except under § 179.

⁴ *Thames Iron Works v. Patent Derrick Co.*, (1859) 29 L. J. Ch. 714; *Scott v. Newington*, 1 Moo. & Rob., 252.

⁵ *Hari Ram v. Danapal Singh*, 11 C. L. R. 389.

⁶ For general principles see *Bloxam v. Sanders*, (1825) 4 B. & C. 941.

⁷ Blackburn p. 325, *Bloxam v. Sanders*, (1825) 4 B. & C. 941; *Schotsmans v. Lancashire Ry.* (1867) L. R. 2 Ch. p. 340.

⁸ Blackburn, p. 818.

⁹ Section 39 (1).

in the contract, *e.g.*, an agreement that the buyer shall have the goods before payment or on giving a negotiable security payable at a future date, which is conditional payment.

A right of lien is generally indivisible and extends over all the goods in the seller's possession for any and every part of the price. This was the Common Law¹ and is preserved by section 95.²

§ 341.
Lien
indivisible.

*Prima facie*³ every contract although for delivery by instalments, even if the instalments are to be paid for separately, is indivisible, and the lien extends over every part of the goods for the price of the whole.¹ But the agreement may provide that each instalment is to be treated as a separate contract, and the lien is accordingly apportionable. Even without an express agreement, if the instalments are to be paid for separately and some are in fact paid for, the contract will be treated as containing in itself a power of apportionment.⁴

When
apportion-
able.

The Contract Act only gives a lien for the price of the goods,⁵ not for charges and expenses incurred in respect of them owing to the goods being retained. The vendor's remedy, if any, for such claims is personal against the buyer.⁶ In *Somes v. The British Empire Shipping Co.*,⁷ the House of Lords held that where a shipwright kept a ship in his dock after repairing her, in order to preserve his lien, he had no right to add to his lien the dock charges against the owner for the period of such detention or for the costs incurred in exercising his lien, however much the

§ 342.
Lien for
price.

¹ *Wentworth v. Outhwaite*, (1842) 10 M. & W. p. 442; *Ex parte Chalmers*, (1878) 8 Ch. 289.

² *Cf.* S. of G. Act s. 42.

³ *Mersey Steel Co. v. Naylor*, (1884) 9 A. C. p. 439; but see *per* Matthews J. L. *Brailthwaite v. Foreign Hardwood Co.*, (1905) 2 K. B. 543 C. A.

⁴ *Merchants' Banking Co. v. Phoenix*, (1877) L. R. 5 Ch.D. 205.

⁵ The Common Law and the S. of G. Act are the same.

⁶ See S. of G. Act s. 37.

⁷ (1858), 8 H. L. C. 338, 28 L. J. Q. B. 220 H. of L. (This was a case of ordinary lien, but the same principle applies.)

§ 342. buyer was in default. The Court did not decide whether there might not be a personal claim if the ship was kept simply owing to the owner's default in not taking delivery after notice that she was ready. Apparently¹ there would be a personal claim, not a lien, for charges in such a case.²

New Duties. There is no decision as to whether price for the purpose of lien includes a duty subsequently imposed,³ but semble the right to add it to the price involves a right of lien therefor.

§ 343. The right is only a right to retain for the price, and Unpaid. arises⁴ (a) where the goods have been sold without any stipulation as to credit;⁵ (b) where the goods have been sold on credit, but the term of credit has expired;⁶ (c) where the buyer becomes insolvent.⁷

Effect of giving credit. The giving of credit or the taking of a negotiable instrument is equivalent to agreeing to receive payment at a future date and the right of lien is in abeyance, while the credit lasts. Such credit ceases on the insolvency of the buyer⁸ or the expiration of the term of credit⁹ or on the dishonour of the negotiable instrument¹⁰ given in payment and the right revives if the seller is still in possession and unpaid, and this is so although the seller has previously during the period of credit been in default¹⁰ and though the

Credit.

¹ The text writers on Contracts usually treat it as giving no right, as the act was done against the will of the owner, but see next note.

² See S. of G. Act s. 37 and *per* Bayley J. in *Bloxam v. Sanders*, (1825) 4 B. & C. 941; see *per* Lord Ellenborough in *Greaves v. Ashlin*, (1813) 8 Camp. 426, so held in *America*; see Benj. 4 Ed. 808; *Crommelin v. New York Ry. Co.* (1868) 4 Keyes 90.

³ See § 311.

⁴ See s. 41 S. of G. Act.

⁵ See section 95.

⁶ See section 96.

⁷ See section 96.

⁸ *Bloxham v. Sanders*, (1825), 4 B. & C. 941 p. 948; *Miles v. Gorton*, (1833) 2 C. & M. 504.

⁹ This point was treated as settled law in England since *Bunney v. Poyntz*, (1833) 4 B. & Ad. 568.

¹⁰ *Valpy v. Oakeley*, (1851) 16 Q. B. D. 941, 20 L. J. Q. B. 380; *Griffiths v. Perry*, (1859) 28 L. J. Q. B. 204.

buyer is not deprived of his vested right of action, still the parties are in such case placed in the same condition as if no bills had been given, and damages are in consequence nominal only¹ unless the value of the goods at the time of the breach was above the contract price.¹ It makes no difference if the contract was for specific or unascertained goods.²

§ 343.

Where part of the price is payable before delivery and credit given for the rest, the lien is waived as regards the rest.³

Credit as to part of the price.

The term "unpaid" is defined by section 38 of the Sale of Goods Act, and includes the following :—(1) When the whole price⁴ has not been paid or tendered.⁵ (2) When a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour⁶ of the instrument or otherwise (including insolvency). The question is, has the seller in fact been paid⁷: and except when the seller has negotiated the bill or note *without recourse*⁸ or is not liable on it⁷ the fact that the instrument is outstanding in the hands of a third party is immaterial if the buyer is insolvent.⁹ If the instrument has been discounted or endorsed by the seller and then

Bill or note taken.

¹ *Valpy v. Oakley*, (1851) 16 Q. B. D. 941, 20 L. J. Q. B. 380; *Griffiths v. Perry*, (1859) 28 L. J. Q. B. 204.

² *Ex. parte Chalmers*, (1878) 8 Ch. 289.

³ *Poulton v. Anglo-American Oil Co.*, (1911) 27 T. L. R. 38 affirmed, *ibid.* p. 216.

⁴ As Benjamin points out this would cover the case when credit has been given: the meaning is "price that is due."

⁵ Tender divests the lien. *Martindale v. Smith*, (1841) 1

Q. B. 389; see s. 38 of Contract Act.

⁶ Previously to dishonour the seller is paid, though only conditionally; *Valpy v. Oakeley*, (1851) 16 Q. B. 941, 20 L. J. Q. B. 380.

⁷ *Bunney v. Poyntz*, (1838) 4 B. & Ad. 568 and see Ch. XII; cf. s. 38 (1) S. of G. Act.

⁸ Benjamin 5th p. 829, Negotiable Instruments Act, ss. 35, 52.

⁹ *Gunn v. Bolckow*, (1875) 10 Ch. 491; *Miles v. Gorton*, (1884) 2 C. & M. 504.

§ 343. dishonoured by the buyer the seller has his lien,¹ for an action lies against him by the holder if due notice of dishonour be given.² It is the same if the seller's agent is in a similar position, for the agent would have a right of indemnity against his principal.³

Negotiable
instrument.

The taking of a negotiable instrument payable by the buyer merely suspends the lien,⁴ which reverts on that instrument being dishonoured, or on the buyer becoming insolvent, for in such case there is almost a certainty that his acceptances will be dishonoured, and the seller is so far favoured that he can retain the goods as security for the price, and is not compelled to part with them when the probability is that outstanding bills of an insolvent buyer will be dishonoured.⁵

But a bill or note received as conditional payment may be converted into an absolute payment by fulfilment of the condition or by matter *ex post facto*⁶ equivalent to payment. If the seller has been paid no matter how, his lien is gone. In *Bunney v. Poyntz*⁷ the defendant's agent sold hay to the buyer and took a promissory note for £70 for it, payable to the agent's order, which he discounted with the plaintiffs to whom he endorsed it. The agent did not pay his master the defendant the proceeds and became bankrupt. The buyer dishonoured the note, which had not been indorsed by the defendant. So far the seller was in this position, his agent for whom he was responsible was

¹ See Benjamin, 5th Ed. p. 831.

² See Negotiable Instruments Act s. 35. In Smith's Mercantile Law, Ed. 1877, p. 541, it is said that though in such case the seller is liable on the bill, he ought not to be allowed to sue for the price of the goods until he has paid it, on the general principle that it is a good defence to an action for debt that the bill given for it is

outstanding, see *Belshaw v. Bush*, 22 L. J. C. P. 24, approved in Benjamin 4th Ed. 736; see § 307, but that does not affect the question of his lien, Benj. 5th Ed. p. 829.

³ Benj. 5th Ed. p. 831.

⁴ Section 96 Contract Act.

⁵ See Benj. 5th. Ed. p. 831.

⁶ See § 301.

⁷ (1833), 2 L. J. K. B. 55. But see *Re Defries*, (1909) 2 Ch. 423.

liable to refund the value of the note and consequently he himself would have had to refund, and was consequently very much unpaid. The buyer then resold the hay to the plaintiffs for £75, taking his own note for £70 as part payment. The plaintiffs sued for the hay in trover; the seller set up his lien: it was held that he was paid, for his agent took a promissory note and realised it, and the note was no longer dishonoured but had been met.

§ 343.

As the right is only given to the seller to enable him to obtain payment of the price, it follows that a tender of the price puts an end to the lien even if the seller declines to receive the money.¹

§ 344.
Effect of
tender of
price.

The circumstances under which the right is lost are set out in section 43 of Sale of Goods Act.² The unpaid seller of goods loses his lien or right of retention thereon (a) when he delivers goods to a carrier or other bailee or custoder for the purpose of transmission to the buyer³ without reserving his right of disposal of the goods³; (b) when the buyer or his agent lawfully obtains possession of the goods⁴; (c) by waiver thereof; (d) the unpaid seller of goods has a lien or right of retention thereon, does not lose his lien or right of retention by reason only that he has obtained judgment or decree for the price of the goods.⁵

§ 345.
Loss of the
right.Decree for
price.

(a) (b) and (c) are deducible from section 95 of the Contract Act, and section 96 gives a particular instance of waiver; (d) was the Common Law and doubtless holds good in India.

¹ *Martindale v. Smith*, (1841) 1 Q. B. 389.

² Deducible from s. 95.

³ *Bolton v. L. & Y. Ry. Co.*, (1866) L. R. 1 C. P. p. 439; Pollock on 'Possession' pp. 71, 72.

⁴ *Cooper v. Bill*, (1865) 34 L. J. Ex. 161.

⁵ *Houlditch v. Desanges*, (1818)

2 Stark. 337; *Scrivener v. G.N. Ry.*, (1871) 19 W. R. 388. Chalmers is doubtful whether in such a case the lien extends only to the price or also to the costs on the judgment; but it seems lien in India is only for the price, see sec. 95.

**§ 346.
Waiver.**

A lien may of course be waived expressly. It may also be waived by implication, at the time of the formation of the contract where the terms show that it was not contemplated that the seller should retain possession until payment; and it may be abandoned during the performance of the contract by the sellers actually parting with the goods before payment.

Lien is *primâ facie*¹ waived by implication by a sale on credit.

**§ 96.
Lien where
payment is
to be made
at a future
day, but no
time is
fixed for
delivery.**

Where, by the contract, the payment is to be made at a future day, but no time is fixed for the delivery of the goods, the seller has no lien, and the buyer is entitled to a present delivery of the goods without payment. But if the buyer becomes insolvent before delivery of the goods, or if the time appointed for payment arrives before the delivery of the goods the seller may retain the goods for the price.

**“Insol-
vency”
defined.**

Explanation.—A person is insolvent who has ceased to pay his debts in the usual course of business or who is incapable of paying them.

Illustrations.

A sells to B a quantity of sugar in A's warehouse. It is agreed that three months' credit shall be given. B allows the sugar to remain in A's warehouse. Before the expiry of the three months, B becomes insolvent. A may retain the goods for the price.

When time is given for payment and nothing is said about delivery, this amounts to giving credit.²

This section is, as usual, worded as a hard and fast rule. The Common Law is that the parties may agree otherwise,³ whether this applies in India is discussed *ante*.

¹ *Spartali v. Benecke*, (1850) 19 L. J. C. P. 293. See *Godts v. Rose*, (1854) 17 C. B. 229, where a sale “on 14 days' credit” was construed as preserving the lien.

² Benjamin, 5th Ed., p. 835; 4th Ed. p. 809.

³ *Spartali v. Benecke*, (1850) 16 C. B. 212, 19 L. J. C. P. 293.

There may be a trade usage which preserves the lien¹; any such usage is saved by section 1 of the Act. But unless there is a special agreement or usage to that effect, selling goods on credit means that the buyer is to take possession, and the seller is to trust to his promise of future payment. Usage preserving lien.

Taking a bill of exchange or other negotiable security payable at a distant date amounts to giving credit during the currency of the instrument.² It is the postponement of payment which is the essential part of the security as affecting the right of lien.

The mere fact of taking security does not displace the lien; the security must be inconsistent with it.³ No presumption that a vendor intends to relinquish his lien arises by his taking personal security from a third party.⁴ The reason was given by the Privy Council.⁵ Lien is not the result of an express contract; it is given by implication of law. If, therefore, a mercantile transaction which might involve a lien is created by a written contract, and security given for the result of the dealings in that relation, the express stipulation and agreement of the parties for security exclude lien, and limit their rights to the extent of the express contract they have made.⁶ But, as § 347.
Effect of taking security.

¹ *Field v. Lelean*, (1861) 6 H. & N. 617, 80 L.J. Ex. 168 (Exch. Chamber), overruling *Spartali v. Benecke*, (1850) 19 L. J. C. P. 298 on this point.

² *Tamvaco v. Simpson*, (1865) 19 C. B. N. S. 453.

³ *Angus v. Maclachlan*, (1888) 23 Ch. D. 330; *Chambers v. Davidson*, (1866) L. R. 1 P. C. 296, deals with an inconsistent security; though the judgment is expressed generally, it must be read with reference to the facts; see. Benj.

5th Ed. 837; *Re Taylor*, (1891) 1 Ch. 590, 60 L.J. Ch. 505; cf. *Groom v. Cheesewright*, (1895) 1 Ch. 730, *In re Douglas*, (1898) 1 Ch. 199 (solicitor's lien); *Cowell v. Simpson*, (1899) 16 Ves. 275; *Tamvaco v. Simpson*, (1866) L. R. 1 C. P. 363.

⁴ Cf. *Karupiah v. T. R. Hari*, (1911) 21 M. L. J. 849.

⁵ *Chambers v. Davidson*, (1866) L. R. 1 P. C. 296, 4 Moo. P. C. C. N. S. 158, see last note.

⁶ Cf. *re Leith's Estate*, (1866) L. R. 1 C. P., p. 805.

§ 347.
Security.

Benjamin¹ points out, this passage must be read with reference to the facts, *i.e.*, an inconsistent security. This is clear from *Angus v. Maclachlan*.² The same principle applies though the contract is not in writing, but the expression "limit their rights" is not to be misunderstood, for the lien revives on insolvency if that renders the security of problematical if any value.

§ 348.
Lien lost by giving up possession.

The seller's lien is lost when he parts with the possession of the goods to the buyer.³ The Sale of Goods Act lays it down that the lien is divested when the buyer lawfully obtains actual possession, and this qualification holds good in India; for the buyer cannot acquire any right by his tortious act.⁴

Possession of buyer.

For the buyer to obtain actual or constructive possession sufficient to end this right, there must have been such delivery of the goods as would afford a defence to an action for non-delivery, which question has been discussed.⁵

Possession must be as buyer.

The buyer must take possession in the capacity of buyer; the lien is not lost if a horse sold to a buyer is lent to him previous to payment⁶ or if a bailee continues to hold possession as such until payment.⁷ The principle is a well known one. So where the pledgees of a bill of lading handed it back to the pledgors to enable the latter to sell the cargo on account of the pledgees, the House of Lords held that they had not lost their security, the pledgors' possession being only that of the pledgees' agents for a special purpose.⁸

¹ See 5th Ed. 837.

² (1883) 23 Ch. D. 330.

³ See sec. 95.

⁴ See also the case of *Stoppage*, § 412.

⁵ See under "Delivery."

⁶ *Tempest v. Fitzgerald*, (1820) 8 B. & Ald. 680; *Marvin v. Wallis*, (1856) 6 E. & B. 726, 25 L. J. Q. B. 369.

⁷ Benj., 5th Ed. 844; see *Reeves v. Copper*, (1838) 5 Bing. N. S. 136; *Nyberg v. Handelaar*, (1892) 2 Q. B. 202.

⁸ *North-Western Bank v. Poynter*, (1895) A. C. 58.; cf. *Babcock v. Lawson*, (1880) 5 Q. B. D. 284 (redelivery obtained by fraud).

When the seller agrees to hold the goods as bailee for the buyer, it is not clear whether he retains his right of lien. The Code throws no light on the position. The question turns on the construction of the word "possession" in section 95.

§ 349.
Position of
a seller
who has
become
bailee for
the buyer.

The Common Law rule was that in such a case the lien was lost, but revived on the insolvency¹ of the buyer, not on his mere default.² This has been altered in England by the Sale of Goods Act, section 41(2) under which the unpaid seller has the right, although he is the buyer's bailee to retain the goods. There is no such provision in the Code, and the Common Law rule, it seems, must apply in Presidency towns,³ and the lien is lost only to revive on insolvency, although in the Mofussil the Courts may follow the English Statutory rule as being in accord with equity and justice.⁴

Even at Common Law, however, the agreement to divest the lien must be express⁵; mere acceptance of warehouse rent⁶ from the original buyer or the giving of a delivery order have been held not to effect the lien.⁷ Mere marking goods with the buyer's name,⁸ or setting them aside,⁹ or packing them to the purchaser's order in

¹ *Gunn v. Bolchow*, (1875) 10 Ch. p. 501; *Miles v. Gorton*, (1833) 2 C. & M. 504; *Townley v. Crump*, (1836) 4 A. & E. 58; Benjamin 4th Ed. p. 771; 5th Ed pp. 831, 839, Chalmers, p. 74, 5th Ed. p. 85; *Grice v. Richardson*, (1877) 3 App. Cas. 319 P. C.

² *Cusack v. Robinson*, (1861) 1 B. & S. 299, 30 L. J. Q. B. 261.

³ Pollock doubts this: Contract Act, 2nd Ed., p. 389.

⁴ But it has been held he loses his lien and cannot resell under s. 107: *Peeran v. Shroff Subba*, 15 M. C. C. R. 254.

⁵ *Re Roberts*, (1887) 36 Ch. D. 190, 200, and see § 245.

⁶ *Grice v. Richardson*, (1877) 3 Ap. Ca. 319; Blackburn, 2nd Ed. 341; *New v. Swain*, (1828) 34 R. R. 767. 1 Dan. & L. 193.

⁷ *Townley v. Crump*, (1835) 5 L. J.K. B. 14, 43 R.R. 300, 4 A. & E. 58.

⁸ *Proctor v. Jones*, (1826) 2 C. & P. 532; *Dixon v. Yates*, (1838) 5 B. & Ad. 313.

⁹ *Townley v. Crump*, (1835) 4 A. & E. 58; *Simmons v. Swift*, (1826) 5 B. & C. 857.

§ 349. his cloths or boxes,¹ so long as the seller holds the goods and has not agreed to give credit, does not divest the lien.²

Conditional delivery does not divest the lien until the condition is fulfilled.³

Under the Statute of Funds in England under which "actual receipt" of the goods by the buyer is essential in certain cases, the test applied has been whether the seller has lost his lien.⁴

§ 350.
Part deli-
very.

When the unpaid seller has made part delivery of the goods, he may exercise his right of lien or retention on the remainder, unless such part delivery has been made under such circumstances as to show an agreement to waive the lien or right of retention.⁵ It is a question of intention, and has been discussed under section 92. But it is to be noticed that that section only refers to the passing of the property, and though in *Dixon v. Yates* the view seems to have been that an inchoate delivery of the whole deprived the seller of his lien, if the intention was to take the whole, and in a later case the question was said to turn on the intention of the buyer,⁶ still section 96 contemplates actual delivery of the whole. It seems that delivery of part will not divest the lien as to the residue unless such delivery amounts to attornment by the bailee to the buyer and no instance is to be found where delivery of part has been held to be delivery of the remainder when held in the seller's own custody.⁷

¹ *Boulter v. Arnott*, (1838) 1 C. & M. 333. See too *Goodall v. Skelton*, (1794) 2 H. Bl. 316.

² Of course the property must have passed, or no question of lien arises.

³ *Hinks v. Hassall*, (1829) 9 B. & C. 372.

⁴ *Baldecy v. Parker*, (1823) 2 B. & C. p. 44, and see § 245.

⁵ Cf. Sale of Goods Act, s. 42,

which adopts the C. L.; Benj. 5th Ed. 841; *Dixon v. Yates*, (1838) 5 B. & Ad. 313, 341; *Ex parte Cooper*, (1879) 11 Ch. D. 68; cf. *per* Lord Blackburn in *Kemp v. Falk*, (1882) 7 App. Cas. p. 588. See *Slubey v. Heyward*, (1795) 2 H. Bl. 504 (a case of stoppage in transit).

⁶ *Tanner v. Scovell*, (1845) 14 M. & W. p. 38.

⁷ Benj. 5th Ed. p. 844.

As regards severable contracts, as for instance where delivery is to be made by three instalments, if the first has been delivered and paid for, and the second has been delivered and not paid for, the seller may withhold delivery of the third, if he has a lien, until payment is made for both the second and third instalments¹ In the case cited the buyer was insolvent; Chalmers doubts the position if he were not,² but it seems clear that the lien for the whole unpaid portion of the price remains.³

§ 350.
Severable
contract.

Where goods are delivered to a carrier the ordinary rule is that the carrier is the buyer's agent and delivery to him divests the lien.⁴ The seller may, however, undertake to deliver the goods to the buyer and the carrier is then the seller's agent,⁵ and the lien remains. This is the Common Law. Or the seller may reserve the right of disposal, and this is not delivery to the buyer⁶ as by taking a bill of lading in his own name, and then delivery can only be made by endorsement of a bill of lading.⁷ This has the effect of controlling not only a right of property but also reserving the possession, for it amounts to delivery to the captain on behalf of the person indicated by the bill of lading.⁸ But this result does not follow if the buyer has paid for the goods in substance.⁹

§ 351.
Delivery to
a carrier.

The endorsement and delivery of a bill of lading transfers the property in the goods to which it relates from the seller to the buyer and is a complete delivery,¹⁰ and therefore divests the seller's lien.¹¹

Endorsement
of bill of
lading.

¹ *Ex parte Chalmers*, (1873) L. R. 8 Ch. 289.

² 5th Ed. p. 87.

³ See § 341.

⁴ *Wait v. Baker*, (1848) 2 Ex. 1; *Fragano v. Long*, (1825) 4 B. & C. 219.

⁵ *Dunlop v. Lambert*, (1836) 6 Cl. & F. 600; *Badische v. Basle*, (1898) A. C. 200, Benjamin 5th Ed. p. 837.

⁶ *Wait v. Baker*, (1848) 2 Ex. 1 and see § 199.

⁷ *Sanders v. Maclean*, (1883) 11 Q. B. D. 327.

⁸ See *Jus disponendi* supra.

⁹ *Cowasjee v. Thompson*, (1845) 5 Moo. P. C. 165.

¹⁰ *Sanders v. Maclean*, (1883) 11 Q. B. D. p. 341; see § 243.

¹¹ Bills of Lading Act IX of 1865.

§ 351.
Parting
with docu-
ments of
title.

A delivery order properly so called is a mere promise to deliver,¹ and delivery is not complete until the bailee attorns to the buyer and thus becomes the latter's agent as custodian of the goods.² The seller's lien¹ is not affected until the buyer has obtained possession or the acceptance of the order by the bailee.³ And if there has been a sub-sale the effect was the same at Common Law,³ though now, where there has been a transfer of a document of title to a sub-buyer, the question depends on whether section 108 applies.⁴

Where
buyer's title
not complete.

But those cases must be distinguished where, although the bailee has accepted a delivery or other order, the buyer's title is not complete because something yet remains to be done to the goods by the seller or the bailee as his agent; then, if the buyer becomes insolvent the seller can countermand the order,⁵ though if the goods had been ascertained the lien would have been lost.⁶

Warrants—
certificates.

Warrants and certificates are in a like position, and may be subject to conditions.⁷

Anticipatory
attornment.

As Benjamin⁸ suggests there is no reason why a bailee should not give authority to the owner to assent for him

¹ *Gillman v. Carbutt*, (1889) 61 L. T. 281 C. A.; *J. C. Shaw v. Bill*, (1884) 8 M. 38; *LeGeyt v. Harvey*, (1884) 8 B. 501; *G. I. P. v. Hammandas*, 14 B. 501, and see § 247.

² Even if the bailee is a Dock Company bound by law to deliver when required by the seller to do so; *Bentall v. Burn*, (1824) 3 B. & C. 423; *Farina v. Home*, (1846) 16 M. & W. 119; *Woodley v. Coventry*, (1868) 32 L. J. Ex. 185.

³ *McEwan v. Smith*, (1849) 2 H. L. C. 309; *Griffiths v. Perry*, (1859) 1 E. & E. 680, 28 L. J. Q. B. 204.

⁴ But see *Ganges Manufacturing Co. v. Sourugmull*, (1880) 5 C. 669, where the form of the delivery order is not given.

⁵ *Busk v. Davis*, (1814) 2 M. & S. 397; *Wallace v. Breeds*, (1811) 13 East 522; *Hanson v. Meyer*, (1805) 6 East 614.

⁶ *Hammond v. Anderson*, (1804) 1 Bos. & P. N. R. 69, 8 R. R. 763; *Swanwick v. Sothorn*, (1839) 9 Ad. & E. 895.

⁷ Benjamin 5th Ed. p. 847. *Farina v. Home*, (1846) 16 M. & W. 119; *Bartlett v. Holmes*, (1853) 22 L. J. C. P. 182.

⁸ 5th Ed. p. 851.

to become bailee for the subsequent buyer. But the decision in *Farina v. Home* was against this.¹

Where, by the contract, the payment is to be at a future day, and the buyer allows the goods to remain in the possession of the seller until that day, and does not then pay for them, the seller may retain the goods for the price.

Illustration.

A sells to *B* a quantity of sugar in *A*'s warehouse. It is agreed that three months' credit shall be given. *B* allows the sugar to remain in *A*'s warehouse till the expiry of the three months, and then does not pay for them. *A* may retain the goods for the price.

Section 97.
Seller's lien where payment is to be made at a future day, and buyer allows goods to remain in seller's possession.

This point was decided at Common Law in *New v. Swain*.² This decision was quoted as at nisi-prius by Blackburn, Benjamin and Chalmers, and consequently Blackburn considered the law unsettled. This accounts for a separate section being inserted on the point.

§ 352.
Where period of credit has expired.

A seller, in possession of goods sold, may retain them for the price against any subsequent buyer, unless the seller has recognised the title of the subsequent buyer.

Section 98.
Seller's lien against subsequent buyer.

In the leading case at Common Law it was said the rule is clear that a second vendee who neglects to take either actual or constructive possession, is in the same situation as the first vendee through whom he claims: he gets the title defeasible on non-payment of the price by the first vendee.³ For a sub-sale by the buyer does not affect the seller's right, unless he has assented thereto,⁴ or unless the ordinary rules of estoppel apply.

§ 353.
Sub-sales.

The seller may recognise the title of a sub-purchaser and reserve his right of lien; but if he unreservedly

¹ See § 250.

Ad. 313.

² (1828) 1 Dan. & L. 193, 34 R. 767 and at nisi-prius in *Bunney v. Poyntz*, (1833) 4 B. & Ad. 568.

⁴ Cf. s. 47 S. of G. Act; Contract Act s. 98, *Dixon v. Yates*, (1833) 5 B. & Ad. 313; *Pearson v. Dawson*, (1858) 27 L.J.Q.B. 248.

³ *Dixon v. Yates*, (1833) 5 B. &

§ 353. recognises it, the sub-sale may take effect by estoppel¹ notwithstanding that no specific goods have been appropriated as between the seller and the first buyer.² Probably the expression "recognises the title" was not intended to alter the Common Law rules as to the necessity for the seller's assent, for it is not mere recognition of the fact of the sub-sale but of the sub-buyer's title free of lien that is required.

§ 354.
What
amounts
to assent to
sub-sales.
Unascertained
goods.

Where the
goods are
ascertained.

Goods not in
existence.

Unascertain-
ed goods.

What assent
affects the
seller's
rights.

Where no question of estoppel arises such acts as presenting to an unpaid vendor delivery orders in favour of sub-purchasers and the entry accordingly of the names of the sub-purchasers in the books of the unpaid vendor may have very different effect according as the goods are specific or unascertained. In the former case it may be more readily inferred that the unpaid vendor has assumed the position of an agent or bailee holding the goods for and on behalf of the sub-purchaser or holder of the delivery order, and the entry of the holder's name in the books of the unpaid vendor might in the case of specific goods justify an inference that the unpaid vendor had accepted that position. No such inference could be drawn if the goods were not in existence³ and it does not follow that because the inference may be drawn in the case of specific goods, it will also be drawn in the case of goods in existence but unascertained.³

The assent which affects the unpaid seller's right of him must be such an assent as in the circumstances shows that the seller intends to renounce his rights against the goods. It is not enough to show that the fact of a sub-contract has been brought to his notice and that he has assented to it merely in the sense of acknowledging the receipt of the information. His

¹ *Stoveld v. Hughes*, (1811) 14 East 308.

² *Knights v. Wiffen*, (1870) L.R. 5 Q.B. 660; *see* para. 467.

³ *Mordaunt v. British Oil and Cake Mills*, (1910) 2 K.B. 502; *see Poulton v. Anglo-American Oil Co.*, (1911) 27 T.L.R. 216 C.A.

assent to the sub-contract in that sense, would simply mean that he acknowledged the right of the purchaser under the sub-contract to have the goods subject to his own paramount right, under the contract with his original purchaser, to hold the goods until he is paid the purchase money.¹ This reasoning seems unanswerable, and recognising the sub-buyer's title must be something more than a courteous acknowledgment of his purchase. The seller must be entitled to say, you have purchased the goods, but I retain my lien,² though it is advisable to state this expressly. For the mere reply of "yes" when asked if a delivery order was all right, has been frequently held in the particular circumstances to estop the seller from setting up his lien,³ *sed quaere* whether these cases have not gone too far; *see* para. 467.

§ 354.
Assent to
sub-sales.

Where the bailees were informed by the original sellers of a sub-sale by their buyer but had not attorned to the buyer or sub-buyer, it was held that the seller's lien was unaffected.⁴

Part
delivery.

Part delivery would make no difference to the seller's rights, especially if the portion delivered had been paid for by the original buyer.⁵

Sub-buyer,

But it has been said in the case of a sub-sale with the privity of the original vendor the abandonment by the latter of his lien will be presumed more easily than

¹ *Mordaunt v. British Oil and Cake Mills*, (1910) 2 K. B. 502; *see Poulton v. Anglo-American Oil Co.*, (1911) 27 T.L.R. 216 C.A.

² *Stoveld v. Hughes*, (1811) 14 East. 308.

³ *Anglo-Indian Jute Mills v. Omademull*, (1908) 38 C. 127; *see Ganges Manufacturing Co. v. Sourugmull*, (1880) 5 C. 669, where it seems the delivery order showed the goods had not been paid for, *see* p. 676: if so,

the alleged assent to a sub-sale seems insufficient though it was held otherwise: *quaere* whether whatever the delivery order stated the facts would amount to an assent in view of the English case.

⁴ *Poulton v. Anglo-American Oil Co.*, (1911) 27 T.L.R. 216 C.A. (a poor report).

⁵ *Mordaunt v. British Oil and Cake Mills*, (1910) 2 K. B. p. 508.

it would have been in regard to the first vendee¹ and may be proved by comparatively slight evidence.²

**§ 355.
Assent by
issue of
documents.**

**Anticipatory
assent.**

Assent may be evinced by issue of documents to the buyer negotiable by custom or intention, and the seller may be estopped³ thereby, but not if documents of title are obtained by the sub-buyer without the assent of the seller to any such document being issued.⁴ But anticipatory assent will not be inferred from the mere issue to the buyer of a document stating the goods are ready for delivery,⁵ or that the seller engages to deliver them,⁶ or similar statements as long as the document is not one of title⁵ or which does not contain a statement that the goods are free from lien so as to create an estoppel⁷ or which must have been intended by the seller to be used for the purpose of sale or pledge.⁷

**§ 356.
Estoppel.**

Where sellers consented to a transfer to a sub-buyer of goods unappropriated to the contract, it was held that they could not set up their lien as unpaid sellers against the transferee who had advanced moneys relying on their consent to the transfer.⁸

**§ 357.
Principle.**

Sub-sales.

There are two doctrines under either of which assent to a sub-sale divests the seller's right of lien, namely the doctrine of estoppel and the doctrine of attornment by a bailee who has the goods in his hands.⁹ These two doctrines were mixed up⁸ in *Knights v. Wiffin*.⁹ Under

¹ Campbell on 'Sales' p. 194.

² Blackburn 2nd Ed. 336 and see § 245 under 'Assent of seller to be bailee.'

³ *Merchant Banking Co. v. Phoenix*, (1877) 5 Ch. D. 205. See *Anglo-India Jute Mills v. Omademull*, (1910) 38 C. 127.

⁴ *Craven v. Ryder*, (1816) 6 Taunt. 433.

⁵ *Gunn v. Bolckow*, (1875) 10 Ch. 491, 44 L.J. Ch. 732.

⁶ *Farmeloe v. Bain*, (1876) 1 C. P.D. 445, 45 L.J. C. P. 264; *Gillman v. Carbutt* (1889) 61 L.T. 251.

⁷ *Merchant Banking Co. v.*

Phoenix, (1877) 5 Ch. D. 205.

⁸ *Ganges Manufacturing Co. v. Sourugmull*, (1880) 5 C. 669, 5 C. L.R. 492; *Anglo-India Jute Mills v. Omademull*, (1911) 38 C. 123.

⁹ Benj. 5th Ed. 864 and Polloch Indian Contract Act 2nd Ed. 391, treat it as resting on estoppel. So does Blackburn 3rd Ed. 204-206, but cites *Gillett v. Hill*, (1834) 2 C. & M. 530 which was not a case of estoppel.

¹⁰ Per Brett in *Simm v. Anglo-American Tele. Co.*, (1879) 5 Q. B.D. p. 212.

¹¹ (1870) L. R. 5 Q. B. 680.

the doctrine of estoppel the party to whom the representation is made must alter his position in consequence, though if through the seller's conduct he is induced to rest satisfied that the property has passed and to take no further steps for his own protection that is sufficient to raise an estoppel.¹ It is clear that the section rests on the doctrine of attornment,² and there is no necessity to allege any alteration in the situation of the party relying thereon, though from the English ruling³ it seems that the attornment must be such as to raise a reasonable belief that the seller has no lien or is waiving it.

As to the effect on the seller's lien of a transfer by the buyer of documents of title see *infra*⁴; the question depends on whether a buyer is within section 108.⁴

§ 357.
Sub-sales.

§ 358.
Transfer of documents of title.

Of course if the document transferred is not within section 108, as for instance if it does not show title to goods or refers to unascertained goods, the transfer does not affect the seller's lien apart from assent or custom.⁵

Under the Sale of Goods Act⁶ a pledge or other disposition of the goods by the buyer assented to by the seller defeats the lien *pro tanto*, and this is doubtless so in India, if a case of estoppel or attornment arises.

It is not clear whether the section includes the case of a mortgagee; if it does not, the case is governed by the previous law.⁷ It has been held that the word seller in section 99 has not altered the law so as to exclude agents buying with their own money or on their own credit, and this is apparently the case with section 95.⁸

§ 359.
Who may exercise the right.
Mortgagee.
Agents paying for goods.

¹ *Knights v. Wiffin*, (1870) 32 L. J. Ex. 185; *Simm v. Anglo-American Tele. Co.*, (1879) 5 Q. B. D. 188; *Dixon v. Kennaway*, (1900) 1 Ch. 833.

² Cf. *Slovel v. Hughes*, (1811) 14 East. 308.

³ *Mordaunt v. Bristol Oil and Coke Co.*, (1910) 2 K. B. 502 C.A.

⁴ See § 477.

⁵ See *Anglo-India Jute Mill v. Omademull*, (1910) 38 C. 127 C.A., but see § 484.

⁶ Section 47.

⁷ *Ganges Manufacturing Co. v. Sourimull*, (1880), 5 C. 669, 5 C. L.R. 492.

⁸ *Peacock v. Baijnauth*, (1890) 18 I. A. 78 per Appeal Court, citing *Feise v. Wray*, 8 East. 98.

§ 360.
No right to
resell at
Common
Law.

A lien at Common Law conveys no right to sell whatever, but only a right to retain until the debt in respect of which the lien was created has been satisfied.¹ This right is given by section 107 of the Contract Act, subject to the conditions therein laid down.

§ 361.
Effect of
exercising
lien.

The exercise of the right of lien does not rescind the contract.² In the case of default in payment, the buyer may put an end to the lien and entitle himself to delivery by payment or tender of the price within a reasonable time.³ Even the buyer's insolvency⁴ does not operate of itself to rescind the contract,⁵ for the official assignee may within a reasonable time⁶ elect to proceed with it.⁷ But the conduct of the insolvent and his trustee may amount to a refusal of performance entitling the seller to rescind under section 39 of the Act. An agreement to rescind in a case of insolvency will be presumed on slight grounds,⁸ and similarly the conduct of a buyer though not insolvent, may amount to a repudiation of the contract when the seller refuses to deliver without payment.⁹ A sub-purchaser is probably entitled to obtain the goods by tendering the price to the original seller within reasonable time.¹⁰

Insolvency.

Position of
sub-pur-
chaser.

§ 362.
Limitation

Lien is not affected by the law of limitation,¹¹ but this point does not arise in mercantile contracts, for neglect on the buyer's part for three years to demand delivery would be ample evidence of abandonment of the contract.

¹ Sm.'s L. C. 11th Ed. Vol. 1 p. 199.

² Cf. S. of G. Act s. 48 (1).

³ *Martindale v. Smith*, (1841) 1 Q. B. 389, 55 R. R. 285.

⁴ See further § 240.

⁵ See 107, *Tolhurst v. Associated Cement Manufacturers*, (1903) A. C. 414, (1902) 2 K. B. 660; *Mess v. Duffus*, (1901) 6 Com. Cas. 165.

⁶ *Ex parte Stapleton*, (1879) 10 Ch. D. 586 C. A.

⁷ *Jaffer Meher Ali v. Budge*.

Budge Jute Mills, (1907) 34 C. 289.

⁸ *Morgan v. Bain*, (1874) L. R. 10 C. P. 15.

⁹ *Ex parte Chalmers*, (1878) L. R. 8 Ch. p. 293, 294; *Jiwan Vurjurg v. Haji Osman*, (1903) 5 Bom. L. R. 378.

¹⁰ *Ex parte Stapleton*, (1879) 10 Ch. D. 586 C. A., cf. *Kemp v. Falk*, (1882) 7 Ap. Ca. p. 577, 578.

¹¹ *Nim Chand v. Jagabundhu*, 22 C. 21; *Nursing v. Hurreghur*, 5 C. p. 899.

CHAPTER XIII.

Stoppage in Transit.

So far the position of an unpaid seller has been considered who has retained possession of the goods although the property has passed to the buyer, and has therefore *primâ facie* his lien. The law gives the seller a further right after he has parted with possession of stopping the goods while they are in transit to the buyer¹ and in his constructive possession, if the buyer and only if the buyer becomes insolvent and if the seller exercises his right before the buyer obtains actual possession. Both these rights arise by implication of law. Neither of them is founded on property, but they necessarily suppose the property to be in the buyer, and not in the seller.²

§ 363.
Stoppage in transit.

The precise limits of this right at Common Law were not well ascertained, but it certainly interfered with the purchaser's rights both of property and possession. The right to stop in transit is peculiar to the contract of sale. Apparently in its origin the right sprang from mercantile usage, and is now universal in the various systems of European jurisprudence.³

Extent of right.

A seller who has parted with the possession of the goods, and has not received the whole price, may, if the buyer becomes insolvent, stop the goods while they are in transit to the buyer.

Section 99.
Power of seller to stop in transit.

The Indian law is the same as the English Common Law which is reproduced in the Sale of Goods Act save

§ 364.
Indian and English law alike.

¹ For the history of this right see *Gibson v. Carruthers*, (1841) 8 M. & W. 337, Benj. 5th Ed. p. 871 n. 6.

² *Lickbarrow v. Mason*, (1787) 9 East. 21, 27. The statement in Blackburn as to the right existing

"even if the property has passed" is misleading, 2nd Ed. p. 357, 3rd Ed. p. 396.

³ Blackburn 2nd Ed. p. 315; see *Gibson v. Carruthers*, (1841) 11 L. J. Ex. 145, 8 M. & W. 321 for the history of the right.

in respect of the documents of title on the *bonâ fide* assignment of which for value the right is defeated.¹

The rules apply both to cases of carriage by land or sea.² Apparently this is so in England.³

The doctrine has always been construed favorably to the unpaid vendor.⁴

Onus of
proof.

The onus of proving that no right of stoppage exists is on the buyer or other person disputing the seller's claim.⁵

§ 365.
Right
neither
equitable
nor legal
in origin.

It must be noted that the right is not an equitable right imported into law, for it would then follow that it could only prevail against those who had an inferior equity, and section 101 shows that this is not so. It is not a legal right depending on the strictness of law, for in that case the vendee could not confer a legal right greater than he had himself, and section 102 shows that he can.⁶ It would seem to be a purely anomalous right originating in mercantile usage. "Much confusion" said Lord Ellenborough, in *Waring v. Cox*, "has arisen from similitudinary reasoning on the subject." This curious phrase exactly expresses the fact.⁸

It is not a question of lien, for by parting with the possession the unpaid vendor releases his lien, for a lien depends on possession.

§ 366.
Reason of
rule.

The right is based on the plain reason of justice and equity that one man's goods shall not be applied to the payment of another man's debts.⁹ Though, as Benjamin points out, this is not strictly accurate in phraseology, for the property must be in the buyer, otherwise the right cannot arise.¹⁰

¹ See § 417.

² See § 99.

³ Blackburn, 3rd Ed., p. 413.

⁴ *Bethell v. Clark*, (1888) 20 Q. B. D. p. 617.

⁵ *Wood v. Jones*, 7 DouL. & R. 126; *The Tigress*, 22 L.J. Adm. 97, 101.

⁶ See Blackburn 2nd Ed. p. 319.

⁷ 1 Camp. 369.

⁸ Blackburn 2nd Ed. p. 395.

⁹ Benj. 4th Ed. p. 843; *D'Aquila v. Lambert*, (1761) 2 Eden. 77, Amb. 399.

¹⁰ 5th Ed. p. 870.

This right may be exercised by a seller of goods and others in an analogous position, being peculiar to one who holds the character of a vendor,¹ while he is wholly or partially unpaid, on the insolvency or failure of the buyer,² as against such buyer and all persons claiming under him,³ except as against an indorsee ^{and}/_{or} a transferee of the bill of lading or other document of title for such goods, who has given valuable consideration for such endorsement ^{and}/_{or} transfer, in ignorance of any circumstances which would prevent such indorsement or transfer from acting as a valid transfer of a property or interest in the goods, or as against a sub-buyer to whose purchase the original vendor has assented.⁴ by claiming or taking the goods as by a right paramount to that of the purchaser, at any time before the vendee has acquired possession of the goods by himself or his agent, and so terminated the transit.

§ 367.
When the right arises.

The right of stoppage in transit is peculiar to one who stands in the position of a vendor⁵ and does not depend on the fact that the seller having had a lien and parted with it, may get it back again if he can stop the goods in transit, but is a right arising out of his relation to the goods qua seller, which is greater than a lien. Other persons having liens have no such right.⁶ But the right is so highly favoured that it has been extended to quasi-sellers, *i.e.*, to persons in a position similar to sellers. Section 38 (2) of the Sale of Goods Act includes for the purpose of this right under the term seller "any person who is in the position of a seller, for instance an agent of the seller to whom the bill of lading has been indorsed⁷ or a consignor or agent who has himself paid or is directly

§ 368.
Who may exercise the right.

Quasi-sellers.

¹ Contract Act, s. 99.

² Contract Act s. 99.

³ Contract Act s. 101.

⁴ But see § 381.

⁵ *Kinlock v. Craig*, (1790) 3

T. R. 783, Blackburn 3rd Ed. p. 848.

⁶ *Sweet v. Pym*, (1800) 1 East. 4.

⁷ *Morison v. Gray*, (1824) 2

Bing. 260.

§ 368. responsible for the price." This was so at Common Law and these instances are not exhaustive.¹ It has been held by the Privy Council that as regards India the word "seller" in section 99 has not altered the previous law.² The following persons have been held to have the right. A factor³ or quasi-vendor can exercise the right, but a factor can only do so as vendor,⁴ and not by virtue of any lien he has over the goods,⁵ and only if he is liable in the first instance for the price^{6, 7}. A commission agent purchasing goods with his own money on order from his principal can stop as against his principal⁸ and this was held to be so although the whole transaction was English.⁷ But this does not apply if both agent and principal are living abroad,⁸ or if the foreign principal is really carrying on business in the name of the agent.⁹ An agent indorsee of a bill of lading, may exercise the right though the endorsement was for the sole purpose of stopping the goods, and may do so in his own name, and this was so in England before the Sale of Goods Act or the Bills of Lading Act of 1855.¹⁰ If the bill is not indorsed to him, then he may, if so instructed, stop in his principal's name.¹¹

Factors.

Commission agents.

Indorsee of bill of lading.

¹ Benj. 5th Ed. 872.

² *Peacock v. Baijnath*, (1890) 18 I.A. 78, 18 C. 578.

³ For the test whether a party is a factor or broker or a seller, see *Lathesing v. Laing*, (1873) L. R. 17 Eq. p. 101.

⁴ *G. I. P. v. Hanmandas*, 14 B. 57; *Feise v. Wray*, (1802) 8 East. 93; *Ireland v. Livingstone*, (1872) L. R. 5 H. L. 395, 408.

⁵ *Kinlock v. Craig*, (1790) 3 T. R. 786, 4 Bro. P. C. 47; *Hathesing v. Laing*, (1873) L. R. 17 Ex. p. 101 (broker), S. of G. Act s. 38 (2).

⁶ *Feise v. Wray*, (1802) 8 East. 93; *Ex parte Banner*, (1876) 2 Ch. D. p. 287; *Peacock v. Baijnath*,

(1890) 18 I.A. 78; *Ex parte Miles* (1885) 15 Q. B. D. 39; *Ex parte, Francis*, (1887) 56 L.T. 577.

⁷ *Tucker v. Humphrey*, (1828) 4 Bing. 516; for the position of such an agent, see *Cassaboglou v. Gibb*, (1883) 11 Q. B. D. 797.

⁸ *Maspous v. Mildred*, (1882) 9 Q. B. D. 530, 8 A. C. 874.

⁹ *Trueman v. Loder*, (1840) 11 A. & E. 589; *Calder v. Dobell*, (1871) L. R. 6 C. P. 486; *Filbey v. Hounsell*, (1896) 2 Ch. 737.

¹⁰ *Morison v. Gray*, (1824) 2 Bing. 260.

¹¹ *Whitehead v. Anderson*, (1842) 9 M. & W. 518.

So may a consignor who has bought with his own money or on his own credit : ¹ a principal consigning to a factor on joint account even where consignment is made to the factor under advances may do so, as the goods are in such a case the principal's² even if the factor has made advances on the faith of the consignment³ or has a joint interest with the consignor.³

§ 368.
Consignor
who has paid
principal and
factor.

A firm may exercise the right against an individual partner who has bought goods on his own account.⁴ An alien enemy trading under license may do so.⁵ An agent of the seller may on behalf of his principal,⁶ and if he has paid the purchase money himself and incurred liabilities in respect of the purchase, on his own account.⁷

Firm against
partner.
Alien.
Agents.

Occasionally attempts have been made by unauthorised persons to stop. According to Benjamin when stoppage is effected on behalf of the vendor by one who has no authority to act for him a subsequent ratification of the vendor will be too late if made after the transit is ended.⁸ This was certainly held in *Bird v. Brown*.⁹ But *Hutchings v. Nunes*¹⁰ does not establish the converse proposition, that if ratified before the transit ends, it is effectual. For it was held that the agent had authority to stop in that case. The Privy Council held that Nunes had authority to stop the goods, on the ground that the letter of authority from the consignors sent on the 16th April though not arriving

§ 369.
Unauthoris-
ed persons.

¹ *Fetse v. Wray*, (1802) 8 East. 93, Benj. 5th Ed. p. 872; *Cassaboglou v. Gibb*, (1883) 11 Q.B.D. 797; C. A.; *Ex p. Miles*, (1885) 15 Q. B. D. 39; *Ex p. Francis*, (1887) 56 L. T. 577.

² *Newsom v. Thornton*, (1805) 6 East. 17.

³ *Kinlock v. Craig*, (1789) 3 T. R. 119, 788. But see *Velji Hirji v. Bharmal*, (1896) 21 B. 287.

⁴ *Ex p. Cooper*, (1879) 11 Ch. D. 68.

⁵ *Fenten v. Pearson*, (1812) 15 East. 419.

⁶ *Whitehead v. Anderson*, (1842) 9 M. & W. 518.

⁷ *Bholanath v. Baij Nath*, (1867) 2 Agra. 11.

⁸ 4th Ed. 847.

⁹ (1850) 4 Ex. 786.

¹⁰ (1863) 1 Moo. P. C., N. S. 243, but see *Wood v. Jones*, (1825)

7 Doul. & Ry. 126; Blackburn, 3rd Ed. p. 351.

§ 369. until May, was sufficient to warrant for all purposes what was done as on behalf of the consignors on the 21st of April. In India the law is laid down in section 200 of the Contract Act, and such a stoppage will be ineffectual, and the seller must subsequently stop the goods by an authorised agent if he can. It is to be noted that an unauthorised stoppage does not prolong the transit.¹

Indian rule.

§ 370.
Where
interest
is execu-
tory.

An unpaid vendor of an interest in an executory contract may stop. It is not necessary that the property in the goods should have ever vested in the person who exercises the right. His interest will be sufficient if he has contracted to have the goods delivered to him.²

Surety.

It was held that a correspondent on whom bills of exchange for the price of a cargo have been drawn and who has accepted them, cannot exercise this right.³ But it seems that he is in the position of a surety and therefore, if he has paid the seller, can do so under section 140 of the Contract Act. The view that he can do so, taken by English writers, is based on an English Statute similarly worded.⁴

When seller
knew of in-
solvency of
buyer.

In America it has been held that a seller, who knew, when he sold the goods, of the buyer's insolvency, has no right to stop.⁵

A person sending money on a particular account or for a particular purpose can exercise a similar right,⁶ even if he has sent a bill of exchange.⁷

If a paid seller stops goods to assist his buyer against an insolvent sub-buyer he is liable in trover.⁸

¹ *Bird v. Brown*, (1850) 4 Ex. 195.
786.

² *Jenkyns v. Usborne* (1844) 13 L. J. C. P. 196, 7 M. & G. 676.

³ *Siffken v. Wray*, (1805) 6 East. 371.

⁴ Mercantile Law Amendment Act 19 and 20 Vict. c. 97, s. 5; see *Imperial Bank v. London and St. Katherine Docks*, (1877) 5 Ch. D.

⁵ *Smith v. Barker*, 102 Ala. 679, Parsons, 9th Ed. Vol. I, 633 n.

⁶ *Smith v. Bowles*, (1797) 2 Esp. 578.

⁷ *Muller v. Ponder*, 55 N. Y. 325.

⁸ *Spears v. Travers*, 4 Camp. 251.

The seller to be paid as section 99 states, must have received the whole price. Part payment does not affect his right which is indivisible,¹ unless the contract is apportionable, in which case the price can also be apportioned and part of the goods being paid for will be exempt from stoppage.³ The fact that he has given credit, the term of which has not expired or taken the buyer's acceptances as conditional payment, does not make him any the less unpaid, for all these forms of credit are ended by the buyer's insolvency even if the bills are outstanding.³ But if he has compounded with an insolvent buyer he is paid.⁴

§ 371.
The seller must be unpaid.

Unpaid.

Composition with insolvent buyer.

This general rule that taking security for payment is only conditional payment, may be excluded if the intention of the parties is to treat it as a final discharge of the debt⁵; the burden of proving such an intention rests on those who assert it.⁶ But the seller may elect to receive payment in some other form than cash and must abide by the consequences.⁷

Taking Security.

It is clear law that the fact of a negotiable instrument being outstanding, though accepted by the buyer, is no payment⁸ (unless the seller has endorsed it "without recourse," in which case it is payment⁹), for the right of the holder of bills to prove against the bankrupt's estate cannot have more effect than part payment.¹⁰

Bills outstanding.

¹ *Hodgson v. Loy*, (1797) 7 T. R. 440, 4 R. R. 483.

² *Merchant Banking Co. v. Phœnix*, (1876) 5 Ch. D. 205.

³ *Kuttayan v. Palaniappa*, (1903) 27 M. 540 (hundis); *Bholanath v. Baij Nath*, (1867) 2 Agra. 11.

⁴ *Nichols v. Hart*, 5 Car. & P. 179.

⁵ Chalmers' Bills of Exchange, 6th Ed. 313; *Owenson v. Morse*, (1796) 7 T. R. 64.

⁶ Benj. 4th Ed. 733, 734 and see § 347.

⁷ *Bidder v. Bridges*, (1887) 57 L. J. Ch. 300; Blackburn, 3rd Ed. p. 356 n.

⁸ The Privy Council did not notice the argument that such affected the right to stop in *Peacock v. Baijnath*, 18 C. 577.

⁹ See § 304. Benj. 5th Ed. 830.

¹⁰ *Feise v. Wray*, (1802) 3 East. 93.

§ 371.
Unpaid.

When the seller has received payment from the holder of the bill and is not liable to take it up, he is paid in every sense of the word. In *Bunney v. Poyntz*¹ payment was made by a promissory note which the seller's agent negotiated and embezzled the money, the buyer afterwards discharged his liability on the note to the holder. It was held that as the seller could not be made to refund the money to the holder of the promissory note, he was paid.

**Bills partially
paid.**

Even if the bills of exchange are endorsed as having been partially paid, this is not part payment if in fact the payment was made in respect of a balance due excluding the sum due for the goods in respect of which the bills were drawn.²

**Bill accepted
by third
party.**

The position of a seller who takes a bill of exchange accepted by a third party is considered by Blackburn³: his view is that though there are no authorities on the point, such acceptance would operate as payment unless and until the bill was dishonoured.

If the vendor is to send a bill for acceptance and fails to do so it has been held that he cannot stop the goods.⁴

§ 372.
**Running
account
between
the parties.**

Where there is a running account between the parties it is difficult to say if the seller is paid or not. The fact that there is an unadjusted account current between the vendor and the vendee, will not divest the right;⁵ but if there is, after allowing for the price of the goods and striking out of account any credit which may have been given to the consignee in respect of his unpaid or immature acceptances,⁶ an ascertained balance against the vendor, it seems that

¹ (1833) 4 B. & Ad. 568.

² *Lilladhar Jaiaram v. Wreford*,
(1892) 17 B. p. 83.

³ 3rd Ed. 360.

⁴ *Green v. Haythorne*, (1816)
1 Stark. 447, 18 R. R. 805.

⁵ *Wood v. Jones*, (1825) 7 Dowl.
& R. 126.

⁶ *Feise v. Wray*, 3 East. 96;
Newsom v. Thornton, (1805) 6
East. 17; *Kinlock v. Craig*, 3 T.R.
119.

the right is lost.¹ If goods are sent and the consignment is specially appropriated to the discharge of or as security for a balance of account at the time of the shipment, the consignor is not in the position of an unpaid seller at all, even if the balance consist of outstanding bills which by the insolvency become valueless and reverse the balance, as it is a case of pledge.¹ So in America it has been held that the right can never apply to a consignment to a creditor to whom the consignor is indebted to the full value of the goods.² In *Vertue v. Jewell*¹ it was held that although the vendee may have become insolvent, still if the state of his accounts with the vendor be such that the vendor is upon the whole indebted to the vendee, he cannot stop in transit goods of less value consigned to the vendee on account of the balance, as delivery can occasion no injustice ; and if the balance against him be occasioned by the vendee being under acceptances for his accommodation, he cannot stop in transit while the bills are running. *Sed quaere.*³ *Vertue v. Jewell* was explained in *Patten v. Thompson*⁴ as being a case of pledge.

When goods were consigned to the plaintiffs to sell on the defendant's account and the plaintiffs shipped goods to the defendant but not specifically in return for the defendant's consignment, and their bill being dishonoured, they stopped the goods, it was argued that the right could not be exercised on a mere apprehension that the balance of account was against the defendant. The Court held the stoppage was good, adding that if the cargo had been intended as a return for the defendant's consignment there would have been a great deal of weight in the argument.⁵

¹ *Vertue v. Jewell*, (1814) 4 Camp. 31 explained as being a case of pledge in *Patten v. Thompson*, (1816) 5 M. & S. 360.

² *Clark v. Mauron*, (1832) 3 Paige 373. (Amer.)

³ See Blackburn 2nd Ed. 331.

⁴ 5 M. & S. p. 360, Blackburn (220, 2nd Ed. 331) and Benjamin (5th Ed. 878) agree with this.

⁵ *Wood v. Jones*, (1825) 7 Dowl. & R. 126.

§ 372.

Unpaid.

§ 372.
Where value
has been
paid.

It has long been established that if a man consigns a cargo and the person to whom he sends it has paid the value before, though he did not know of the sending of the cargo at the time, the sending to the carrier will be sufficient to prevent the assignees of the consignor taking back the goods in case of the intervening bankruptcy of the consignee.¹

§ 373.
Effect of
taking
security.

The fact that the seller has taken security from the buyer to meet bills drawn against the goods does not prevent his exercising a right to stop the goods. In *Ex parte Watson*² the seller took security for meeting bills drawn on the goods consigned, and the agreement was that he should have a lien on the goods while in transit and on the proceeds in the hands of the buyer's foreign factor. The Appeal Court held that such an agreement did not destroy or diminish the right to stop the goods: and that independently of any right he had under the agreement he had the original right of a vendor to stop in transit. In a Bombay case a similar decision was arrived at, without considering *Ex parte Watson*,² and in consequence the Court seems to have been more cautious than was necessary in suggesting possible limits to the right. In that case the unpaid sellers sold goods to a firm to meet a contract, the proceeds to be held as protection for drafts drawn on the firm; the firm was paid by their buyers and subsequently became bankrupt; the sellers stopped the goods but the sub-buyers obtained possession subsequently: it was held that an agreement between the original sellers and the first buyers that the sellers were to recover the goods if they could from the sub-buyers, and to give up their claim to the sum paid by the sub-buyers for the goods, did not defeat the right to stop in transit, if the moneys paid were not ear-marked. The Court added that if the firm had

¹ *Alderson v. Temple*, (1768) 4 Barr. p. 2239; *Alley v. Holson*, (1815) 4 Camp. 325. ² (1877) 5 Ch. D. 35 C.A. 46 L.J. Bk. 97, 36 L.T. 75.

held the moneys in trust for the seller, it might be a case of subrogation.¹

As to cases in which goods are deposited in trust to sell and pay the proceeds or a portion of them to some person, *see* Blackburn, 2nd Ed., p. 269 ; 3rd Ed., p. 292.² The principle in such cases is that if the seller merely consigns goods and draws on the consignee for the price, the relationship established is that of debtor and creditor, for there is no promise to pay out of a particular fund.³ But if the goods are consigned and received on the terms that certain bills are to be paid out of the proceeds then the relationship of trustee and *cestui que* trust is created ; and in equity the *cestui que* trust has rights in him against the goods or their proceeds which are good against any one who takes the goods subject to the equities which affect them in the hands of the consignee.⁴ And the consignee cannot set up his general lien against such rights.⁵ If goods are sent on such terms the buyer can only take them subject to the trust ; if he does not accept the trust, he cannot retain the goods.⁶ It would seem that in such a case it is not a sale at all, but a deposit on trust. If so no right to stop the goods would arise, as that is right peculiar to a sale of goods.⁷

§ 374.
Goods sent
on trust to
sell.

Goods sent
on trust to
sell.

¹ *Lilladhar Jairam v. Wreford*, (1892) 17 B. p. 83.

² Citing *In re Hallett's Estate*, (1879) 13 Ch. D. 696, 49 L.J. Ch. 415 ; *New Zealand Co. v. Watson*, (1881) 7 Q.B.D. 374 ; *Birt v. Burt*, 11 Ch.D. 773 ; *Harris v. Trucman*, 9 Q.B.D. 264.

³ *Ex parte Carruthers*, 8 De G. & S. 570.

⁴ *Ranken v. Alfaro*, (1877) 48 L.J. Ch. 832, 5 Ch. D. 786 ; *Ex parte Carruthers* *supra* ; Blackburn 3rd Ed. 293 ; *Baijnath v. Peacock*, (1891) 18 C. p. 577 ; *see*

Barlow v. Cockrane, 2 B.L.R. O.C. 56.

⁵ *Frith v. Forbes*, (1862) 31 L. J. Ch. 793 on appeal 4 De G. F. & J. 409.

⁶ *Shepherd v. Harris*, (1871) 40 L. J. Q. B. 148 ; *Ex parte Banner*, (1876) 45 L. J. Bank ; 78, 2 Ch. D. 278 ; *Tooke v. Hollingworth*, (1793) 5 T.R. 215.

⁷ But *see Ex parte Watson* *supra* and *Lilladhar Jairam v. Wreford*, (1892) 17 B. 63, though the point was not raised in either case.

§ 374. But there must be a contract to pay the bills out of the proceeds.¹ Merely stating that the debt has been incurred in respect of certain goods is not sufficient,² nor is the attaching of a counterfoil to the bills stating that they are drawn against certain consignments.³ For if bills of exchange purport to be drawn against a particular cargo that does not carry a lien on that cargo into the hands of every holder of the bills.⁴ If a bill of lading is drawn in favour of a named party without any words such as to order or assigns, that is not constructive notice of any equitable arrangement.⁵

Creation of equitable charge.

An equitable charge may be to pay out of a fund an existing debt, a new advance or a bill of exchange; it depends on the agreement of the parties and may be created by writing, course of dealing, or by parol or by custom,⁶ but there must be a specific appropriation.

Bonâ fide third party can acquire interests.

Even if a valid trust is created a *bonâ fide* third party without notice can acquire a title to the goods for value, but his title must be a legal one such as passes by the transfer of a bill of lading, made to order or assigns⁷: if a bill of lading is endorsed to a particular person without any addition of 'to order' or 'assigns,' its transfer only passes an equitable title which, until the legal title is acquired, is subject to prior equities.⁸

¹ *Robey v. Ollier*, (1872) 7 Ch. App. 395.

² *In re Entwistle*, (1876) 3 Ch. D. 477, see for the distinction between the case of a principal consigning goods to an agent, and an agent consigning to a principal, *Ex parte Banner*, (1876) 45 L.J. Bank. 78, 2 Ch. D. 278.

³ *Phelps v. Comber*, (1884) 54 L. J. Ch. 1017; 29 Ch. D. 818, 819; see *Ex parte Dever*, (1884) 13 Q. B. D. 766.

⁴ *Banner v. Johnston*, (1871) L.R. 5 H.L. 157; *Brown v. Kough*, (1885) 29 Ch. D. 848.

⁵ *Henderson v. Comptoir d'Escompte* (1878) L.R. 5 P.C. 253.

⁶ *Brown v. Kough*, (1885) 29 Ch. D. 848.

⁷ *Chartered Bank of India v. Henderson*, (1874) L. R. 5 P. C. 501.

⁸ *Henderson v. Comptoir d'Escompte*, (1878) L. R. 5 P. C. 253, 260.

The seller can only exercise the right against an insolvent buyer. The mercantile law is clear and distinct that the seller has not a right to vary the consignment except in the case of insolvency.¹

§ 375.
Against whom
the right
may be
exercised.

Insolvency.

An insolvent is defined by the English Act² as meaning one who has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due, whether he has committed an act of bankruptcy or not. The Indian definition is in section 96 and amounts to the same. Insolvency is understood generally by merchants as having a popular and not a technical meaning. There is no need of a formal adjudication. Evidence of a general inability to pay debts is sufficient to establish insolvency.³ This was the meaning attached to the word at Common Law.⁴ The right existed long before any technical meaning attached to the word, and has never been held to vary with the alterations in the statutory definitions.⁵ The assignment of all a man's assets for the benefit of his creditors is an act of insolvency, for he is no longer in a position to pay his debts.⁶ An assignment of existing stock-in-trade is not an act of insolvency even if it is to secure future advances.⁶ But an assignment of all future assets, even if for a new consideration and to secure future advances, is an act of insolvency.⁷ Calling one's principal creditors together and asking for an extension of credit has been held not to amount to a declaration of insolvency.⁸ Apparently evidence of failure to pay one just and admitted debt would be sufficient.⁹ In a number of cases the fact that

Insolvent
buyer.

¹ Blackburn, 3rd Ed. p. 413.

² Section 62 (3).

³ *Biddlecombe v. Bond*, (1835) 5 L.J.K.B. 47.

⁴ *Nixon v. Verry*, (1885) 29 Ch. D. 196.

⁵ See *Rogers v. Thomas*, (1849) 20 Conn. 53. (Am.)

⁶ *Re Brij Mohun Dobay*,

(1899) 2 C. W. N. 306; *Kursondas v. Maganlal*, (1902) 4 Bom. L. R. 94.

⁷ In the matter of *Ambrose Summers*, (1896) 22 C. 592.

⁸ *In re Phoenix Co.*, (1876) 4 Ch. D. 108, 46 L. J. Ch. 115.

⁹ Benj. 5th Ed. 880, citing Sm. M. L. Ed. 1877, 550 n.

§ 375.
Insolvent
buyer.

the buyer had "stopped payment" has been considered as a matter of course to be such insolvency as justified stoppage.¹ But there must be such an admission or proof of insolvency as amounts to a refusal to pay.² It has been held that it is undesirable to lay down any general rule save that there must be an inability on the part of the buyers manifested either in act or in word to meet their engagements and a consequent determination not to meet them.³

Until actual possession of the goods sold has been delivered to the purchaser, the vendor's right of stoppage can be set up against the assignee or trustee of the purchaser upon the insolvency of the latter.⁴

Blackburn suggests that it would be a reasonable rule to require that at the time the consignee was refused the goods, he should have evidenced his insolvency by some overt act, because of the great practical difficulty in establishing the actual insolvency of one who still continues to pay his way, and because the carrier obeys the order to stop at his peril if the consignee is still solvent.⁵

The bankruptcy of the buyer⁷ or in the case of a company its liquidation,⁸ does not rescind the contract, and if the unpaid seller has retained possession of the goods or exercised his right of stoppage in transit, the Official Assignee may elect to fulfil the contract by paying the price within a reasonable time.

§ 376.
Stoppage
where
buyer not
insolvent.

An unpaid seller hearing of the buyer's insolvency before goods are despatched, need not send them on

¹ *Bird v. Brown*, (1850) 4 Ex. 786, Benj. 5th Ed. p. 880.

² *In re Phoenix*, (1876) 4 Ch. D. 108, 46 L.J. Ch. 115 C. A.

³ See *Ex parte Stapleton*, 10 Ch. D. 586; *Schotsmans v. L. & Y. Ry.*, (1867) L.R. 2 Ch. 332.

⁴ *Grice v. Richardson*, (1877) 8 App. Cas. 319, 47 L. J. P. C. 48.

⁵ 2nd Ed. 281, 3rd Ed. 418.

⁶ But for the position of a carrier, see § 437.

⁷ *Ex parte Stapleton*, (1879) 10 Ch. D. 586.

⁸ *Tolhurst v. Associated Cement Manufacturers*, (1903) A.C. 414, 72 L. J. K. B. 834.

their transit at all.¹ If the seller stops in transit when the buyer has not yet become insolvent, he does so at his peril. If on arrival of the goods, the buyer is then insolvent, the premature stoppage will avail for the protection of the seller²; but if the buyer remains solvent, the seller would be bound to deliver with an indemnification for any expenses incurred,³ and may be liable for defamation. Whether the buyer be insolvent may not transpire until after the stoppage, *e.g.* when the bill of exchange becomes due, but it is clear law that the right to stop does not require the buyer to have been found insolvent⁴.

§ 376.

The vendor's right to stop in transit cannot be defeated by any claim of lien on the part of a carrier, wharfinger or any other middleman to secure payment of a general balance due to such middleman from the consignee,⁴ but it is postponed to a lien for special charges on the goods carried,⁵ unless the bill of lading states they are carried freight free.⁶

§ 377.

**Not
defeated
by general
liens.**

Not subject
to liens.

Nor is the right defeated by a foreign attachment laid upon the goods by a creditor of the buyer's⁷ or any other attachment as being the buyer's property,⁸ but Blackburn thinks that a seizure by the Sheriff on an attachment against the buyer would defeat the right.⁹ But that is an actual taking possession of the goods and semble a mere attachment without seizure would not

Foreign
attachment.

¹ *Bloxam v. Sanders*, 4 B & C. 941; *Gibson v. Carruthers*, 8 M. & W. 321; S. of G. Act s. 39 (2).

² *The "Tigress"*, (1863) 32 L.J. Adm. 97.

³ *The "Constantia"*, (1807) 6 Rob. Adm. R. 321.

⁴ A custom to that effect was held invalid in *Offenheim v. Russell*, (1802) 3 Bos. & P. 42.

⁵ *Richardson v. Goss*, 8 Bos. & P. 119, Addition on 'Contracts,' 10th

Ed. 576; as to the position of Indian Railways, see the Railway Act.

⁶ *Mercantile and Exchange Bank v. Gladstone*, (1868) L. R. 3 Ex. 223; *Keith v. Burrows*, (1877) 2 A. C. p. 651.

⁷ *Salk v. Field*, 5 T. R. 211.

⁸ *Smith v. Goss*, (1808) 1 Camp. 282; *Bhola Nath v. Baij Nath*, (1867) 2 Agra 11.

⁹ 3rd Ed. 411. But see *Bhola Nath's case supra*.

§ 377. affect the seller's rights ; but if actual possession is taken the transit is ended.

Banian's
lien.

The Calcutta Court of Appeal held that a banian's lien on the goods defeated the consignor's right of stoppage.¹ The goods had been shipped by the plaintiffs to a consignee in Calcutta upon terms that the sale proceeds in Calcutta should be specially appropriated to meet drafts drawn against the shipment. This the Court held amounted to an express trust ; but the consignee's banian had been given, by his agreement with the consignee, a lien on all goods shipped to the consignee to secure advances, and as he had no notice of the trust, his lien displaced the consignor's right to stop in transit, as the bills of lading had been endorsed to him. Before the Privy Council it was argued that the right to stop must prevail unless the banian had a lien on the specific goods. Looking at the authorities cited above, it seems clear that the seller's rights cannot be defeated by any dealings with the goods unless, there is a transfer or pledge of the documents of title for a specific advance and not for previous advances or merely to a person as agent. The right may be subject to a special lien on the goods for freight but no general lien against the buyer affects it. The Privy Council held that there was no lien on the facts.

§ 378.
Right
only
against
the goods.

The proposition laid down in *Ex parte Golding*² that there is a right to stop a sub-buyer's purchase money, is open to doubt. The House of Lords in *Ex parte Falk*³ had *Ex parte Golding* under consideration and it seems would have overruled it if it had been necessary to decide if it was correctly decided ; Selbourne, L. C., laid it down that the right existed against the goods only, but if the right to stop does exist, effect may well be given to it after

¹ *Peacock v. Buijnath*, (1891) 18 270.

C. p. 577, 18 I. A. 78.

³ Sub-rom. *Kemp v. Falk*, (1882)

† ² (1880) 13 Ch. D. 628, 42 L. T. 7 A. C. 573.

a valid stoppage by the sub-purchasers paying the original seller so much of the purchase money as represents the amount of the original purchase price. Benjamin holds the view that the right can be exercised against the goods only,¹ and not against the purchase money on a sub-sale. But Cotton, L.J., in *Ex parte Golding*² and Bramwell, L.J., in *Ex parte Falk*,³ said obiter that on an absolute sub-sale of the goods with transfer of the bill of lading, there may be a right of stoppage as against the purchase money due to the vendor. The actual decision in *Ex parte Golding*,² according to Benjamin, may be supported on the ground that there was an endorsement but no transfer of the bills of lading for they were still in the hands of the buyers. Section 93 of the Contract Act speaks of stopping the "goods" but would not take away any Common Law right as against purchase money.

§ 378.

Sub-buyer's
purchase
money.

The right is to stop the goods in whatever state they arrive and there is no right to stop insurance money accruing to the purchaser in respect of the goods.⁴

Insurance
money.

The right exists against the vendee and all persons claiming under him (with the exceptions provided in Sections 102, 103, Contract Act). Thus it avails against a sub-purchaser from the vendee whose title is not founded on the assignment of a bill of lading, or of some other document of title, for value even though he has paid the purchase money to the vendee. Scrutton gives as the reason that such a sub-sale would only pass to the sub-vendee such equitable interest as his immediate purchaser could convey and not the legal property in the goods, and could not prejudice the unpaid vendor's right to stop which is a right against

§ 379.
Against
whom the
right
exists.
Sub-pur-
chaser.¹ 4th Ed. 896.⁴ *Berndtson v. Strang*, (1868) 3² (1880) 13 Ch. D. 628, 42 L.T. 270.Ch. 598. See *Latham v. Chartered Bank*, (1874) L. R. 17 Eq.³ (1880) 14 Ch. D. 446.

205, 216.

the goods.¹ Whereas in Blackburn on 'Sales' it is said that such a sub-sale transfers the property in the goods, and every right which the immediate bargainer had in the goods, but no greater right: the property passes subject to any restrictions under which his immediate seller held it.²

The right can be exercised against an assignee of a bill of lading who has agreed with the buyer to pay the seller, or has entered into partnership with the buyer.³

**§ 380.
Sub-sale
before
transit.**

The section only refers to sub-sales while the goods are in transit: but there is authority for the proposition that a sub-sale before the transit fixed by the contract has commenced does not of itself defeat the right,⁴ and it is immaterial that the seller knew that the goods were bought and shipped to meet sub-sales.⁵ Apparently the sub-buyer although he has obtained the property in the goods, stands in the buyer's shoes until he obtains a transfer of the documents of title or possession of the goods.

**§ 381.
Whether
consent to
a sub-sale
defeats the
right.**

Under the Sale of Goods Act, section 47, the right to stop is lost if the seller assent to a sub-sale, that is this right stands on the same footing as the right of lien. This, if not an innovation, is at any rate the first time that such a rule has been clearly stated in England.⁶ Some dicta of Jessel, M. R., seem to favour this rule,⁷ but Blackburn, L. J. said in the same case: "no sale (*i.e.*, sub-sale) even if the sale had actually been made with payment, puts an end to the right to stop unless there is an endorsement of the bill of lading."

¹ See Scrutton on 'Bills of Lading,' 5th Ed. 158. This was the view taken by Lord Blackburn in *Kemp v. Falk*, (1882) 7 Ap. Ca. 578.

² 3rd Ed. p. 418, 419, citing *Dixon v. Yates*, (1833) 5 B. & Ad. 813.

³ *Salomons v. Nissen*, (1788) 2 T. R. 674.

⁴ *Lilladhar v. Wroford*, (1892) 17 B. 62, see *Ex parte Golding*, (1880) 13 Ch. D. 628.

⁵ *Kemp v. Ismay*, (1909) 100 L. T. R. 996.

⁶ Benj., 5th Ed. 916.

⁷ *The Merchant Banking Co. v. Phoenix Co.*, (1877) 46 L. J. Ch. 418.

Benjamin¹ argues that as such assent divests the seller's lien as against the sub-buyer or pledgee, for on principle it seems unreasonable that the seller should, after such assent, be able by subsequent stoppage to resume a lien which he had parted with absolutely. § 381.
Assent to sub-sales.

The Contract Act has no express provision on the point and, as no such qualification as in section 98 appears in section 101, is against any such rule.²

Doubtless a case of estoppel might arise, but it has never been suggested that the fact that the seller knew that the goods were purchased and shipped to meet sub-sales affected his right to stop,³ even where the bill of lading was drawn in the sub-buyer's name, but not transferred to him, but was delivered to the buyers and retained by them,⁴ nor where a sub-sale occurred before the transit commenced and the seller knew of it,^{4,5} and the buyer held the bill of lading as trustee for the sub-buyer.⁶ Estoppel.

If the goods were shipped to a sub-buyer and the carriers were his agents as under a bill of lading making the goods deliverable to the sub-buyer, it seems there would be no transit to the buyer at all, and no right to stop would arise in favour of the first seller, at any rate if he consented to such an arrangement,⁶ and Benjamin⁷ suggests if the bill of lading were in the sub-buyer's name with the seller's privity that would defeat his rights, but not if it were retained by the buyers.⁸ Where bill of lading in sub-buyer's name.

A question also needs consideration as to the rights of a sub-buyer. He is in the shoes of the sub-seller, and § 382.
Right of sub-buyer to pay original seller.

¹ Benj., 5th Ed. §16.

² The Act is not exhaustive except so far as it goes: *Irrawaddy Flotilla Co. v. Bugwandas*, (1891) 18 I. A. 121, 18 C. 620, but it seems to go to this point.

³ *Kemp v. Ismay*, (1909) 100 L. T. R. 996; *Bafurgi v. Clan Line*, (1910) 34 B. 640 C. A.

⁴ *Ex parte Golding*, (1880) 13 Ch. D. 628 C. A.

⁵ *Lilladhar v. Wreford*, (1892) 17 B. 62.

⁶ See Blackburn, 2nd Ed. 337.

⁷ 5th Ed. 917 n. 8.

⁸ *Ex parte Golding*, (1880) 13 Ch. D. 628 C.A.

§ 382. that sub-seller's trustee in bankruptcy could by tendering the price in reasonable time obtain goods stopped in transit. So apparently could the sub-seller if he had the money. Why should not the sub-buyer obtain the goods by paying the original seller? ¹ *Ex parte Golding*² favours this view. There, Cotton, L. J., considered whether the right to stop could be made effectual without defeating in any way the interest of a sub-purchaser, and the original seller was relegated to taking his money from the unpaid sub-purchase money.

§ 383.
Duration of
transit.
Where seller
has reserved
a right of
control.

In considering the question of the duration of transit, it must be noted that cases in which the seller when delivering to a carrier has reserved the right of disposal do not come within the scope of the question. It is unfortunate that illustration (c) to section 100 should in terms seem to include such a case. But Benjamin prefaces his masterly discussion of this subject by pointing out that in such a case the seller is not driven to exercise any right of stoppage, for as pointed out above ³ he has reserved the control of the goods and *prima facie* done so for the purpose of refusing delivery before payment. Further if the English view that by so doing the seller prevents the property from passing is adopted in India, the right to stop which only arises when the property has passed, is not available, and at any rate the seller has not parted with his possession, and the illustration (c) to section 100 is in conflict with section 99. In England, however, this state of facts has been said to give a right to stop,⁴ though inaccurately.

Genuine cases of stoppage must also be distinguished from cases where the seller, having given his own agent

¹ See per Selborne L. C. in *Kemp v. Falk*, (1882) 7 Ap. Ca. p. 578.

² (1880) 13 Ch. D. 628 C. A.

³ See under *Jus disponendi* § 213.

⁴ *Craven v. Ryder*, (1816) 6 Taunt. 438; *Ruck v. Hatfield*, (1822) 5 B. & Ald. 682; see *Schotsmans v. L. & Y. Ry.*, (1867) L. R. 2 Ch. p. 336.

instructions to deliver, countermands his order, or refuses delivery after having assented to a sub-sale, where the question is one of lien.¹

The essence of the doctrine of stoppage in transit is that "the goods should be in the custody of some third person intermediate between the seller who has parted with, and the buyer who has not yet acquired actual possession."²

§ 384.
Essence of doctrine.

Goods are to be deemed in transit while they are in the possession of the carrier, or lodged at any place in the course of transmission to the buyer, and are not yet come into the possession of the buyer or any person on his behalf, otherwise than as being in possession of the carrier, or as being so lodged.

Sec. 100.
When goods are to be deemed in transit.

Illustrations.

- (a) *B*, living at Madras, orders goods of *A*, at Patna, and directs that they shall be sent to Madras. The goods are sent to Calcutta, and there delivered to *C*, a wharfinger, to be forwarded to Madras. The goods, while they are in the possession of *C*, are in transit.
- (b) *B*, at Delhi, orders goods of *A*, at Calcutta. *A* consigns and forwards the goods to *B* at Delhi. On arrival there, they are taken to the warehouse of *B*, and left there. *B* refuses to receive them, and immediately afterwards stops payment. The goods are in transit.
- (c) *B*, who lives at Púná, orders goods of *A*, at Bombay. *A* sends them to Púná by *C*, a carrier appointed by *B*. The goods arrive at Púná, and are placed by

¹ Also inaccurately treated as cases of stoppage in *Hawes v. Watson*, (1824) 2 B. & C. 540; *Stoveld v. Hughes*, (1811) 14 East. 308.

² *Gibson v. Carruthers*, (1841) 11 L. J. Ex. 138, 8 M. & W. 321, 328, cited and followed in *Ex parte Rosevear*, (1879) 11 Ch. D. 560 C. A.; *Schotsmans v. L. & Y. Ry.*, (1867) L. R. 2 Ch. Ap. p. 388.

C, at B's request, in C's warehouse for B. The goods are no longer in transit.

(d) B, a merchant of London, orders 100 bales of cotton of A, a merchant at Bombay. B sends his own ship to Bombay for the cotton. The transit is at an end when the cotton is delivered on board the ship.

(e) B, a merchant of London, orders 100 bales of cotton of A, a merchant at Bombay. B sends his own ship to Bombay for the cotton. A delivers the cotton on board the ship, and takes bills of lading from the master, making the cotton deliverable to A's order or assigns. The cotton arrives at London, but before coming into B's possession, B becomes insolvent. The cotton has not been paid for. A may stop the cotton.

§ 385.
Same as
English
law.

The definition contained in section 100 is the same in substance as that in section 45 of the Sale of Goods Act, and is in conformity with the Common Law, and is probably founded on *James v. Griffin*.¹

§ 386.
Meanings of
the word
"possession."

Delivery to
buyer.

As section 100 shows the word possession² has various meanings. The question was discussed in *Kendall v. Marshall*.³ If there has been an intentional delivery of the goods to the vendee and an appropriation of them to his own use, the right to stop does not exist, but it does not necessarily follow that the transit has ended because the goods have come into the buyer's hands or his agent's hands, for that may be for the purpose of forwarding them⁴ where the bargain is that the goods are to be sent to a specified destination⁵; and wrongful delivery to the buyer does not affect the seller's rights.⁶ And if the goods are in the course of transit from the vendor to the

¹ (1836) 2 M. & W. 628.

608, 3rd Ed. 572.

² See § 131.

⁵ See § 395.

³ (1883) 11 Q. B. D. p. 864.

⁶ See § 392.

⁴ Carver on 'Carriers' 4th Ed.

vendee, although the property has passed and the vendee has constructive possession, the right remains.¹ This is so although the carrier or other bailee may have been named and appointed by the vendee.²

§ 386.

Carrier appointed by buyer.

There is another kind of constructive possession by the vendee, that is when the goods have been delivered by the carrier and have reached the hands of an agent to the vendee to be held at his disposal. Such constructive possession divests the right.

Agent awaiting orders.

But the carrier may deliver the goods at a place of deposit in connection with the transmission and delivery of them, and the transit then lasts until they arrive at the actual possession of the vendee or at the possession of his agent who is to hold them at his disposal and deal with them accordingly.³

Place of deposit.

Further the constructive possession of the carrier or bailee to whom he delivers the goods as above stated, will become effectual to defeat the seller's right, if the carrier or such bailee enters into new and distinct agreement, mutually assented to by him and the buyer, to hold the goods at the buyer's disposal, that is if he attorns to the buyer.⁴

Carrier attorning.

The difficulty of the question arises because it is a question of fact—in what capacity does the actual possessor of the goods hold them, as agent to forward or as agent to hold for the buyer. The decisions are not very satisfactory in many instances.⁵

§ 387. Question of fact.

When goods which have been sold are in the actual possession of a carrier or other bailee, three states of fact may exist with regard to them. (1) The carrier or the bailee may hold them as agent for the seller : this is so

§ 388.

Three states in which the carrier may hold goods.

¹ See too *James v. Griffin*, (1827) 2 M. & W. p. 632.

² *Kendall v. Marshall*, (1883) 11 Q.B.D. p. 364.

³ See § 402.

⁴ See *infra* § 407.

⁵ *Ex parte Miles*, (1865) 15 Q. B. D. p. 47 ; see *Kemp v. Ismay*, (1909) 14 Com. Cas. 202.

§ 388. where the seller has reserved a right of disposal, and has thereby retained the property¹ and no question of stoppage arises. (2) The goods may be in medio : the carrier or other bailee may hold them in his character as such for the purpose of forwarding and not exclusively as agent for the buyer or the seller.² In that case the right of stoppage exists potentially, and only in that case ; for it is the essence of stoppage, that the goods should be in the possession of a middleman.³ The carrier or the bailee may hold the goods either originally or by subsequent attornment solely as agent for the buyer. In that case either there has been no right of stoppage and in fact no "transit" at all, or it is determined

In the first case there has been no delivery and the rights of the parties depend on their contract, the law only raising a rebuttable implication that payment is a condition concurrent with delivery.

In the third case there has been delivery and there is no rule of law⁴ which gives the seller any right over the goods when once actual or constructive delivery has been made except in cases where there was no contract at all by him.

In the second case there has been delivery in performance of the contract, but by implication of law the unpaid seller has this anomalous right of stoppage. The essential point is that the carrier should hold the goods *qua* carrier, or if the goods are in a place of deposit that the bailee should hold the goods for the purpose of the transmission on the original transit.

§ 389.
Recent discussion of
subject.

Lord Alverstone has given the latest exposition of the rules as to the duration of transit.⁵ He stated that "As has been pointed out in many cases the question of the

¹ See § 218. Chalmers 5th Ed. (1867) L. R. 2 Ch. Ap. p. 888.
p. 91 says he reserves his
"lien," *sed quære*.

² Benj. 5th Ed 883.

³ *Schotsmans v. L & Y. Ry.*,

⁴ There may be such a right by agreement, Contract Act s. 120.

⁵ *Kemp v. Ismay*, (1909) 100 L. T. 996, 14 Com. Cas. 202.

right to stop is as a rule a question of fact. There is little to be gained by going through or endeavouring to reconcile the numerous cases which have been decided, in some of which the right has been upheld and in others it has been decided that the transit was at an end. The line of distinction is in some cases very fine, whilst in others, as for instance *Berndtson v. Strang*¹, where there was a simple case of defined transit fixed as between the vendor and purchaser, no real difficulty arises. The nearest approach to the enunciation of a principle seems to be that laid down by Lord Esher in *Bethell v. Clark*.² "When the transit is a transit which has been caused either by the terms of the contract or by directions of the purchaser to the vendor, the right of stoppages exists, but if the goods are not in the hands of the carrier by reason either of the terms of the contract or of the directions of the purchaser to the vendor but are in transit afterwards in consequence of fresh directions given by the purchaser for a new transit, then such transit is no part of the original transit and the right to stop is gone."³ And in the same case Fry, L. J., stated at page 617: "If the delivery be to an agent to hold for the vendee or to await further instructions for the despatch of the goods, then no doubt the transit is at an end; but where it is only to an agent or agents whose sole duty it is to transmit the goods, then however many agents' hands the goods pass through, while they are in the hands of any such agents the transit continues. The law so laid down was expressly approved by the Privy Council in *Lyons v. Hoffnung*⁴ and the case was

¹ (1868) L. R. 3 Ch. 588, 87 L. J. Ch. 665.

² (1888) 20 Q.B.D. 615, 617, 57 L.J. Q.B. 802.

³ This quotation was cited as applying to India in *Bapurgi v. Clan Line*, (1909) 11 Bom. L. R. 1250, O. C. (where the Contract

was an English one but the Court did not observe that point; in appeal, 34 B. 610, the Court noticed this and then proceeded to discuss the Indian Contract Act on the point).

⁴ (1890) 15 Ap. Ca. 891, 59 L.J.P.C. 79.

§ 389. followed in *Ex parte Rosevear*.¹ In *Kendal v. Marshall*² the transit was held to have ended at Garston, but it is to be noted that the only order sent to the vendor was to send the goods to Marshall at Garston and there was no evidence on which it could be fairly contended that as between the vendor and purchaser the transit continued to Rouen, *see* page 365; Brett, L. J., says "The vendee afterwards ordered that the goods should be sent to the defendant Marshall at Garston. He did not direct the vendors to deliver the goods to Marshall in order that they might be sent to Rouen. If a direction of that kind had been given the transit would have been from Bolton to Rouen: but the facts are widely different. The vendors gave no order to Marshall; the vendee gave the order to Marshall, to forward them to Rouen. In *Bethell v. Clark*³ Lord Esher, at page 619, distinguished *Kendall v. Marshall* on this ground. *Ex parte Hughes*⁴ seems to have depended on the special facts as distinguishing it from the rule laid down in *Bethell v. Clark*.⁵

§ 390.
Mere ship-
ment not
neces-
sarily a
transit.

Delivery to
buyer's ship.

The mere fact that goods are shipped does not imply that there is what is technically called a transit. For as above stated the seller by reserving his right of control, retains possession, and if the ship is the buyer's there is *prima facie* actual delivery to him and no transit arises.⁶ For the principle is quite clear that delivery into the buyer's own ship or cart is delivery to him.⁶

¹ (1879) 11 Ch. D. 560, 48 L.J. Bk. 100.

² (1882) 11 Q.B.D. 356, 52 L.J. Q.B. 313.

³ (1888) 20 Q.B.D. 615.

⁴ (1892) 67 L.T. 598, a most unsatisfactory case.

⁵ Contract Act s 100, Illus. (d); *Ogle v. Atkinson*, (1814) 5 Taunt. 759; *Turner v. Trustees of Liverpool Docks*, (1851) 6 Ex. 513; *Van*

Casteele v. Booker, (1848) 2 Ex. p. 708.

⁶ Although it was said in *The Merchant Banking Co. v. Phoenix*, (1876) 5 Ch. D. p. 219 to be a matter of fact whether it was so or not, depending on the intention of the parties: and this is supported by the dictum in *Schotsmans v. L. & Y. Railway*, (1867) L. R. 2 Ch. 332, 335, that if the seller did not know that it was the buyer's ship, the right to stop would not be lost.

The same result follows on delivery on to a vessel of the buyer's agent¹ and it makes no difference whether the ship is expressly sent for the goods or is a general ship belonging to the buyer² and the goods are put on board without any previous arrangement.

The ship may be the buyer's either as belonging to him, or as being chartered by him. If the delivery is to a vessel chartered by the buyer, it is a question depending on the circumstances of the particular case whether they are in the possession of the master as a carrier or as an agent for the buyer.³

§ 390.

Chartered ship.

The question first is whether a chartered ship is the buyer's or not ; and, secondly, whether the seller has interposed the master as a carrier between himself and the buyer. The first question depends on the nature of the charter party.⁴ If there has been a demise⁵ of the ship and the buyer is the owner for the voyage and employs the captain, delivery on board will be actual delivery to the buyer, but if, as is usually the case,⁶ the owner of the ship employs the captain, and the charter simply secures the buyer the exclusive use of the ship, it has not this effect.

But it seems that if the destination is part of the bargain it is immaterial that the ship is the buyer's or that he employs agents to ship.⁷

Where destination part of the contract.

But where the ship is the buyer's as being his own, or being demised to him, the seller can restrain the effect of delivery to the buyer's ship by taking a bill of lading in

§ 391. Seller can restrain the effect of delivery to buyer's ship.

¹ *Ex parte Francis*, (1887) 56 L. T. 577. D. 464.

² *Schotsmans v. L. & Y. Ry.*, (1867) 36 L. J. Ch. 361.

³ Sale of Goods Act, s. 45 (5); *Jobson v. Eppenheim*, (1905) 21 T. L.R. 468; *Reid v. Snowball*, (1905) 7 F. 35.

⁴ *Sandeman v. Scurr*, (1866) L.R. 2 Q.B. 86, 36 L. J. Q. B. 58; *Omoa v. Huntley*, (1877) 2 C. P.

⁵ As to what constitutes a demise, see *Smith's M. L.* 11th Ed. 383; Abbott on 'Shipping' 14th Ed. p. 834; *Weir v. Union S. S. Co.*, (1900) A. C. 525, 69 L. J. Q. B. 809.

⁶ Cf. *Berndtson v. Strang*, (1868) 3 Ch. 58.

⁷ *Rodger v. Comptoir d'Escompte*, (1869) L. R. 2 P. C. 393.

§ 391. his own name,¹ (or mates' receipts in his own name²) which *prima facie* would reserve the *jus desponendi*; and though he subsequently endorses it over to the buyer and delivers it to him, this procedure if done with that intent,³ preserves the right to stop in transit.⁴ But this result is not effected by taking bills of lading to the buyer's order, although the seller retains three copies but delivers one to the master⁵; nor, it has been held, is the right to stop preserved by taking mates' receipts in the seller's name and then giving them to the buyer's agent,⁶ *sed quære*.

Where condition of reservation fulfilled.

And where the reservation of the right of control is only intended to make delivery conditional on acceptance of a bill, on the fulfilment of the condition the property is thereby vested in the buyer, but the seller has right to stop in transit.⁷

§ 392. What constitutes transit. Mistaken or wrongful delivery.

The first question to consider is what constitutes what is technically known as a transit. A wrongful or mistaken delivery will not commence⁸ nor will it end the transit.⁹ Unless the seller has assented to the goods going out of his control, the fact that a sub-buyer has,

¹ Contract Act, s 100, Illus. (c); *Turner v. Trustees of Liverpool Docks*, (1848) 20 L. J. Ex. 398. This is valid even though the master has exceeded his authority in signing a bill in that form; *ibid.* 6 Ex. p. 568; *Van Casteel v. Booker*, 2 Ex. 691; *Ellershaw v. Magniac* 6 Ex. 370; *Ogg v. Shuter*, 1 C.P.D. 47; see *ante* § 199.

² See § 199.

³ *Van Casteel v. Booker*, (1848) 2 Ex. 691.

⁴ Even if the ship's destination is uncertain or is afterwards changed: *Bohtlingk v. Inglis*, 3 East. 381, *Berndtson v. Strang*, (1867) 4 Eq. 481; *Fraser v. Witt*, (1868) 7 Eq. 64; *Ex parte Rosevear*, (1879) 11 Ch. D. 560 C. A.

⁵ *Schotsmans v. L. & Y. Ry.*,

(1867) 36 L. J. Ch. 361, *secus* if the seller retains the only stamped copy; *Moakes v. Nicholson*, (1845) 34 L. J. C. P. 273.

⁶ *In re Bruno, Ex p. Francis*, (1887) 56 L. T. N. S. 577. Such agent could stop, the bills being in his name, *ibid.*

⁷ *Cahn v. Pockett*, (1899) 1 Q.B. 654 C. A.

⁸ *Ruck v. Hatfield*, (1822) 5 B. & Ald. 682, see too *Schotsmans v. L. & Y. Ry.*, (1867) L. R. 2 Ch. 382, where it was said that if a vendor shipped goods in a ship in ignorance of the fact that it was the buyer's ship, he would not thereby lose his right to stop; *Bohtlingk v. Inglis*, 3 East. 381.

⁹ *Litt v. Cowley*, (1816) 7 Taunt. 169; *Loeschman v. Williams* (1815) 4 Camp. 181.

without the seller's assent, obtained a bill of lading, gives him no rights.¹ So too any unauthorised dealing with the goods does not defeat the seller's rights,² nor will tortious acts of the carrier prolong the transit.³ Where after notice to stop the carrier's clerk delivered the goods to the buyer by mistake, it was held that the buyer's assignees could not hold the goods, although the buyer had opened the goods and sold part. Gibbs, C. J., said as soon as notice was given the property returns to the sellers. This statement is not correct, the property is not re-vested, but the possession is.⁴

The transit may be from the seller's possession to the buyer, or to the buyer's factors,⁵ or agents,⁶ or to the buyer's sub-buyers, at any rate where, from the circumstances, the seller knew that the goods were being sent to their destination for re-sale,⁷ for to constitute a transit the sellers need not in all cases know the consignee's name or the port of destination.⁸

The transit must be the original transit, that is "a transit which has been caused either by the terms of the contract or by the directions of the purchasers to the vendor."⁹ But if the goods are not in the hands of the carrier by reason of the terms of the contract or of the

§ 393.
Transit
between
whom.

§ 394.
Original or
fresh
transit.

¹ *Craven v. Ryder*, (1816) 6 Taunt. 433.

² *Dixon v. Yates*, (1833) 5 B. & Ad. 313.

³ *G. I. P. v. Hanmandas*, (1889) 14 B. 57; *Bird v. Brown*, (1850) 4 Ex. 786; *Lilladhar v. Wreford*, (1892) 17 B. 62, 88.

⁴ *Litt v. Cowley*, (1816) 2 Marsh. 457, 7 Taunt. 169, cited in *Lilladhar v. Wreford* (1892) 17 B. p. 89; Benj. 5th Ed. 908, Contract Act s. 106, see § 488.

⁵ *Ex parte Watson*, (1877) 5 Ch. D. 35.

⁶ *Lilladhar v. Wreford*, (1892)

17 B. 62; *Kemp v. Falk*, (1882) 7 A. C. 573.

⁷ *Ex parte Golding*, (1880) 18 Ch. D. 628 C. A.; *Kemp v. Ismay*, (1909) 100 L. T. 996, 14 Com. Cas. 202; *Bapurji v. The Clan Line*, (1909) 11 Bom. L. R. 1250; (1910) 34 B. 640 C. A.; *Lilladhar v. Wreford*, (1892) 17 B. 63.

⁸ See § 397.

⁹ *Per Lord Esher, Bethell v. Clark*, (1888) 20 Q. B. D. 615, 617 C. A. 57 L. J. Q. B. 302; see *Dixon v. Baldwin*, (1804) 5 East. 175; *Kendall v. Marshall*, (1883) 52 L. J. Q. B. 318 C. A.

§ 100. directions of the purchaser to the vendor, but are in transit afterwards in consequence of fresh directions given by the purchaser to the forwarding agents for a new transit then such transit is no part of the original transit and the right to stop is gone."¹ This passage was cited as applicable to India in *Bapurji v. The Clan Line*,² and considered by Lord Alverstone to be the nearest approach to the enunciation of a principle.³

§ 395.
Distinction
between
contract
and
directions.

There seems to be a distinction between the two cases. For if there is an actual bargain between the parties as to the destination of the goods, the transit it seems will continue until the goods reach that destination. This appears to have been the decision in *Ex parte Watson*,⁴ where it was said that if the buyer tried to alter the destination, the seller could obtain an injunction. Lord Lindley⁵ explained *Ex parte Watson* as depending on the express agreement of the parties. Bowen, L. J.,⁶ seems to have held the same view when he said that "it was no part of the bargain between the seller and the buyer that the transit should last up to a certain time."

In such a case the agreement may amount to an express trust which the Court would enforce against the buyer and any person taking the goods with notice thereof.⁷

Ex parte Watson was followed in an Indian case.⁸ There Dewhurst of Manchester sold goods to B. R. of London.

¹ *Per* Lord Esher, *Bethell v. Clark*, (1888) 20 Q.B.D. 615, 617 C. A. 57 L. J. Q. B. 302; see *Dixon v. Baldwin*, (1804) 5 East. 175; *Kendall v. Marshall*, (1883) 52 L. J. Q. B. 313 C. A.

² (1909) 11 Bom. L. R. 1250 (1910) 84 B. 640 C. A.

³ *Kemp v. Ismay*, (1909) 14 Com. Cas. 202.

⁴ (1877) 5 Ch. D. 35 C. A.

⁵ *Ex parte Miles*, (1888) 15 Q.B. D. 39, the rest of the Court said

that there no new directions were required from the buyer after despatch.

⁶ *Kendal v. Marshall*, (1888) 52 L. J. Q. B. 313, 11 Q. B. D. 351, 369, approving *Ex parte Watson* : as to the right to intercept such goods, see § 412.

⁷ See § 374, *Peacock v. Baijnath*, (1891) 18 C. 578, 18 L. A. 78.

⁸ *Lilladhar v. Wreford*, (1892) 17 B. 62.

the invoice stated the goods were to be shipped to B. R.'s agents in Bombay, the proceeds to be held as security for drafts drawn by Dewhurst. B. R. instructed Dewhurst to mark the goods with a sub-buyer's mark and deliver them F.O.B. at Liverpool, where B. R. themselves arranged for shipment. Dewhurst was told the names of the ships and sent the goods to them. B. R. never had actual possession. The Court held that though B. R. could have altered the destination of the goods, to have done so would have been a breach of faith if not a violation of the express terms of the contract.¹ The fact that the goods were always in the hands of intermediaries for the voyage differentiated the case from *Ex parte Miles* and brought it within *Ex parte Watson*. For where the bargain is to deliver at a named place it is immaterial that the buyers employed agents to ship,² or shipped themselves.

§ 395.

The directions given by the buyer to the seller may be given after the contract is made and may be transmitted through the buyer's agent,³ and may be contained in any document⁴ or be verbal.⁵ They must be sufficient to keep the goods moving, and be sufficient to enable the goods to be shipped or otherwise forwarded without further directions from the purchaser.⁶ For where the sellers knew the goods were to be sent to a certain place, and so informed the forwarding agent, yet as the forwarding agent could not forward the goods simply on that information, but held them subject to such orders as the buyers might give, it was held that the transit was ended.⁷

§ 396.
Directions.Must be
sufficient.

¹ There was obviously a trust, see § 374.

² *Rodger v. Comptoir d'Es-compte*, (1869) L. R. 2 P. C. 393.

³ *Jackson v. Nichol*, (1839) 5 Bing. N. C. 508 (six months after sale).

⁴ *Bethell v. Clark*, (1887) 20 Q. B. D. 615 C. A.

⁵ *Lyons v. Hoffnung*, (1890) 15 A. C. 391 P. C. 59 L. J. P. C. 79.

⁶ *Kemp v. Ismay*, (1909) 14 Com. Cas. 202; *Bithell v. Clark* supra.

⁷ *Valpy v. Gibson*, (1847) 4 C. B. 887; see *Ex parte Miles*, (1885) 15 Q. B. D. 39, a very similar case; *Dixon v. Baldwin*, (1804) 5 East. 175.

§ 396. The fact that the buyers also gave the same and further directions to the forwarding agents was considered too immaterial for notice.¹

Immaterial
how the bill
of lading is
drawn.

It is immaterial that the bill of lading, the ship being a carrier's ship, is endorsed to the buyer² or is taken in his name³ and delivered to him,³ or obtained direct by him³ or is in his agent's name, or in a sub-buyer's name,⁴ at any rate if so drawn without the seller's privity, or if it is not transferred to the sub-buyer⁴ and it makes no difference who is entered as the shipper therein,³ or if the buyer obtains a fresh bill of lading.³

Roving
voyage.

F. O. B.

It is enough if the seller's instructions suffice to send the goods on a roving voyage,⁵ or, the contract being F.O.B., to despatch the goods on a boat although the sellers did not know its destination.⁶ In such cases the right lasts until the ship arrives at the final destination subject to the buyer's right to intercept.⁶

§ 397.
Need
sellers
know
consignee's
name.

For it seems that the sellers need not know the consignee's name,⁷ or in some cases the place where the goods are to be sent.⁸ Brett, M. R., however said that it was necessary to know both.⁹ But according to Benjamin this observation must be confined to the particular facts of the case.¹⁰ The distinction¹¹ between

¹ *Kemp v. Ismay*, (1909) 14 Com. Cas. 202.

² *Brindley v. Cilgwyn*, (1885) 55 L. J. Q. B. 67.

³ *Lyons v. Hoffnung*, (1890) 15 A. C. 391 P. C.; see *Bethell v. Clark*, (1887) 20 Q. B. D. 615; (mates' receipts sent by carrier to buyer), *Bapurji v. The Clan Line*, (1910) 34 B. 640.

⁴ *Ex parte Golding*, (1880) 13 Ch. D. 628.

⁵ *Fraser v. Witt*, (1868) L. R. 7 Eq. 64.

⁶ *Ex parte Rosevear*, (1879) 11 Ch. D. 560. But it was said that in a C. I. F. contract the transit ended when the goods were

placed on board: *Wanche v. Wingren*, 17 T.L.R. 299.

⁷ *Bapurji v. The Clan Line*, (1909) 11 Bom. L. R. 1250, (1910) 34 B. 640 C. A., citing *Bethell v. Clark*, (1897) 20 Q.B.D. 615.

⁸ *Ex parte Rosevear*, *supra*.

⁹ *Ex parte Miles*, (1885) 15 Q. B.D. 39.

¹⁰ 5th Ed. 892, *see* 1 Law. Q. R. 397.

¹¹ Campbell 2nd Ed. 482 says the distinction between *Ex parte Miles* and *Bethell v. Clark*, was in the character of the agents—in the former merely general forwarding agents; in the latter, carriers to Melbourne.

Ex parte Miles and *Ex parte Rosevear* seems to be that in the former the sellers had to deliver to forwarding agents (to forward as directed by the buyer), whereas in the latter delivery was direct to the carrier, who had no authority to receive save for carriage. The order in *Bethell v. Clark*¹ was to consign to "Darling Downs to Melbourne" and was held sufficient although the seller did not know the consignee's name, for the captain had no authority to receive save for carriage, and though the goods were delivered to a railway who employed a lighter-man to ship them, still every one through whose hands they passed were agents for transmission. In a recent case² the order was given by an agent for buyers in Australia, to sellers in Manchester (as far as they were concerned he was the principal, the real principals being undisclosed), to mark the goods N. X. Z. Adelaide and forward them to Liverpool to the order of forwarding agents there, for shipment per the *Suevic*. The sellers were held entitled to stop the goods; so it seems that it is sufficient although the sellers do not know the consignee's name, and although they send the goods to forwarding agents, if their instructions are to ship per a particular ship.

Knowledge
of destina-
tion.

It makes no difference if the carrier has been named or appointed by the buyer³ or that he is the purchaser's agent to accept delivery so as to pass the property.⁴

§ 398.
Where
carrier
named or
appointed
by buyer.

In India it has been held that where the sellers, on instructions from the buyers, sent goods to Newport marked for Bombay, to agents for shipment by a certain vessel on account of the buyers, the transit lasted to Bombay for

§ 399.
Indian
cases.

¹ *Bapurji v. The Clan Line*, (1909) 11 Bom. L.R., 1250, (1910) 34 B. 640 C. A., citing *Bethell v. Clark*, (1887) 20 Q.B.D. 615.

² *Kemp v. Ismay*, (1909) 100 L. T. R. 996.

³ *Berndtson v. Strang*, (1867)

36 L.J. Ch. 879; *Ex parte Rosevear*, (1879) 11 Ch. D. 560; *Kendall v. Marshall*, (1888) 11 Q. B. D. p. 364.

⁴ *Bethell v. Clark*, (1888) 20 Q. B. D. 615, 617.

the goods awaited no fresh orders from the buyers to put them in motion again. On appeal it was held that even if the shipping agents acted solely on behalf of the buyers, that would not be conclusive as to the end of the transit¹ *semble* if the seller's instruction to them were sufficient for the voyage. The fact that the buyer could have altered the destination at an intermediate stage of the transit owing to his possession of the bill of lading, but did not do so, is immaterial.²

**§ 400.
End of
transit.**

The most convenient way to decide if a transit continues is to consider how it can be ended. The transit is only ended where either there has been a taking possession of the goods by the purchaser as their owner³ or a sending of the goods on a new and different voyage.⁴ Possession sufficient to divest the right must be actual possession of the buyer,⁵ which he may acquire before the goods have reached their appointed destination,⁶ or the possession of an authorised agent who takes possession to hold the goods awaiting the buyer's further directions⁷ or the possession of a carrier or other bailee who attorns to the buyer,⁸ either when the goods have arrived at their destination or before.⁶

**§ 401.
Transit
includes
possession
of forward-
ing
agents.**

Once the seller's instructions send the goods on their original transit, that transit includes the possession of any forwarding agent until the goods "have got into the hands of some one who holds them for the purchaser and for some other purpose than that of merely carrying them to the destination fixed by the contract or by the directions given by the purchaser to the vendor,"⁹ and

¹ *Bapurji v. The Clan Line*, (1909) 11 Bom L. R. 1250, (1910) 84 B. 640 C. A., citing *Bethell v. Clark*, (1887) 19 Q. B. D. 560; cf. *Lilladhar v. Wreford*, (1892) 17 B. 62.

² *Lilladhar v. Wreford*, *supra*.

³ *James v. Griffin*, 2 M. & W. 623, 1 M. & W. 20.

⁴ *Per Cotton, L. J. Ex parte Golding*, (1880) 13 Ch. D. 628 C. A., for fresh transit see § 394.

⁵ See § 405.

⁶ See § 411.

⁷ See § 403.

⁸ See § 407.

⁹ *Per Cave, J., Bethell v. Clark*, (1887) 19 Q. B. D. p. 561.

this is so no matter through how many hands the goods may pass.¹ Thus it may include the possession of a railway, lightermen employed by the railway to ship, and the possession of the shipowners² and of shipping agents,³ even if they act solely on behalf of the buyers,⁴ provided their instructions received from the seller are sufficient for sending the goods on their journey,⁵ although they are usually, but not on that occasion, employed to keep goods until further orders from the buyers.⁶

The goods are also in transit when they are in any place of deposit connected with the transmission and delivery of them, having been there deposited by the person who is carrying them for the purpose of transmission and delivery, and remain in transit until they arrive at the actual possession of the consignee or at the possession of his agent who is to hold them at his disposal and to deal with them accordingly;⁷ or, as it was put in another case, into the hands of his agent to take possession and keep the goods for him.⁸

**§ 402.
Place of
deposit.**

For if the purchaser gives orders that the goods shall be sent to a particular place there to be kept till he gives fresh orders as to their destination to a new carrier, the original transit is at an end when they have reached that place, and any further transit is a fresh and independent transit.⁹

**§ 403.
Arrival at
place of
deposit
await fresh
orders.**

¹ *Jackson v. Nichol*, (1839) 5 Bing. N. C. 508.

² *Per Cave J., Bethell v. Clark*, (1887) 19 Q.B.D. p. 561.

³ *Smith v. Goss*, (1808) 1 Camp. 282; *Coates v. Railton*, (1827) 6 B. & C. 422.

⁴ *Bapurji v. The Clan Line*, (1910) 34 B. 640.

⁵ *Kemp v. Ismay*, (1909) 14 Com. Cas. 202.

⁶ *Jackson v. Nichol*, (1839) 5 Bing. N. C. 508.

⁷ S. 100, *Kendall v. Marshall*, (1888) 11 Q. B. D. 356.

⁸ *James v. Griffin*, (1837) 2 M. & W. p. 632.

⁹ *Bethell v. Clark*, (1888) 20 Q. B.D. 615; *Leeds v. Wright*, (1803) 3 B. & P. 820 (agent to export), *Scoll v. Pettit*, (1803) 3 B. & P. 469; *Jobson v. Eppenheim*, (1905) 21 T.L.R. 468.

Place of
Deposit.

The test is whether the goods have so far gotten to the end of their journey that they await fresh orders from the purchasers to put them in motion again and that without such orders they would remain stationary.¹ And it is immaterial if a further destination is known to the sellers, if the instructions received by them from the buyers and transmitted to the carrier or other bailee are insufficient to keep the goods moving,² although the seller is informed that they are destined for another place and are to be forwarded by the agents and although the latter may employ the seller's servants to forward them.³

Blackburn⁴ points out that if goods are delivered at a wharf or inn without any statement as to whether they are to be received as a step in their progress towards the buyer by force of the original delivery to the carrier, or in order to be held till the buyer gives fresh orders, and the wharfinger or innkeeper accepts the goods with the intention of acting in the capacity in which he shall discover they were meant to be delivered to him, the capacity in which he holds the goods would apparently depend entirely on what was the destination intended by the buyer. But this statement seems in the light of later cases to be inaccurate, for it is now clear that the transit lasts until delivery or attornment.⁵

§ 404.
Includes
delivery.

The transit includes not only the carriage of the goods to the place where delivery is to be made, but also the delivery of the goods there according to the terms of the contract of conveyance.⁶ Accordingly the transit may not

¹ *Ex parte Miles*, (1885) 15 Q.B.D. 39; *Bapurji v. Clan Line*, (1909) 11 B.M.L.R. 1250 in Appeal 34 B. 640, citing *Bethell v. Clark*, *supra*.

² *Valpy v. Gibson*, (1847) 4 C. B. 837, distinguished in *Kemp v. Ismay*, (1909) 14 Com. Cas. 202; *Kendall v. Marshall*, (1883) 52 L. J. Q. B. 313; *Dixon v. Baldwin*, (1804) 5 East. 175; *Ex parte Miles*, (1885) 15 Q.B.D. 39.

³ *Ex parte Hughes*, (1892) 67 L.T. 598, doubted in *Kemp v. Ismay*, 14 Com. Cas. 202.

⁴ 3rd Ed. 401.

⁵ The position depends on the buyer's intention, *James v. Griffin*, 2 M. & W. p. 635.

⁶ *Kemp v. Falk*, (1882) 7 Ap. Ca. p. 588; *Whitehead v. Anderson*, 9 M. & W. 518; see *infra* § 408.

be ended although the goods have arrived at their destination or at a warehouse¹ to which they have been despatched,² or are landed and are in the custody of custom house officers who have a right to retain them for unpaid duties, even if the buyers have petitioned for the goods.³ The same test must be applied in what capacity did the various agents hold the goods.⁴

Actual delivery may be to the vendee, his agent⁵ or sub-buyer⁶ or assignee in bankruptcy,⁷ and may take place at his own warehouse, or a place he uses as his own,⁸ or at a place where he means the goods to remain until a fresh destination is communicated to them by new orders from himself.⁹ Thus it was held that the right to stop was gone because the goods had reached the warehouse which the buyer was using as his own.¹⁰ Of course if he

§ 405.
Actual
delivery.

¹ *In re Worsdell*, (1877) 25 W. R. 460, where goods were sent to the purchaser to Falmouth, and landed and warehoused by the shipping company's agents who, as was their custom, asked the buyer for instructions; before these arrived, it was held the goods could be stopped.

² Benj. 5th Ed. 887, S. of G. Act. s. 45, 3; *Ex parte Barrow*, (1877) 46 L.J. Bh. 71.

³ *Northey v. Field*, (1798) 2 Esp. 613; *Nix v. Olive*, cited in Abbott on 'Shipping,' 14th Ed. 839 and Blackburn 3rd. Ed. 404. The rule is the same in America, *Moltram v. Heyer*, (1846) 5 Denio 629; *Holbrook v. Vose*, (1860) 6 Bosw. (N.Y.) 77.

⁴ Blackburn 248, 2nd Ed. 363.

⁵ *Ex parte Gibbes*, (1875) 45 L.J. Bk. 10, 1 Ch. D. 101.

⁶ *Dixon v. Yates*, 5 B. & Ad. 846.

⁷ *Scott v. Pettit*, (1803) 3 B. & P. 469.

⁸ *Scott v. Pettit*, (1803) 3 B. & P. 469; *Rowe v. Pickford*, (1817) 8 Taunt. 83.

⁹ *James v. Griffin*, (1837) 2 M. & W. 623; *Dixon v. Baldwin*, (1804) 5 East. 175.

¹⁰ *Rowe v. Pickford*, (1817) 8 Taunt. 83; *Richardson v. Goss*, 3 B. & P. 127; *Leeds v. Wright*, (1803) 3 B. & P. 320; *Scott v. Pettit*, *ib.* 469; *Dixon v. Baldwin*, (1804) 5 East. 175; *Hurry v. Mangles*, (1803) 1 Camp. 452 (where the vendor warehoused for rent); *Merchant Shipping Co. v. Phoenix*, (1876) 5 Ch. D. 205. The transit was held to still subsist in *Hodgson v. Loy*, (1797) 7 T.R. 440, 4 R.R. 483; *Nichols v. Le Feuvre*, 2 B.N.C. 83; *Edwards v. Brewer*, (1837) 2 M. & W. 375; *James v. Griffin*, (1836) 2 M. & W. 623, 1 M. & W. 20.

Actual
delivery.

has treated the goods so deposited as his own the case is clear.¹ But the question turns on the buyer's intention, for he may take possession for the benefit of the seller and not as owner.²

To end the transit goods must not only have reached their destination but must have actually got home into the hands of the buyer³ or of one who receives them in the character of his agent or servant. This was said to be the cardinal principle,³ and seems to have been overlooked in an Indian case⁴ where it was held that goods in the hands of the trustees of the Bombay dock were "at home" in port and the transit ended, whereas to end the transit the goods must be delivered to the buyer or be held by an agent who is his servant to hold them, which the Port Trustees were not.

Goods landed
under terms
of bill of
lading.

Romilly, M. R.,⁵ said that to end a transit "the buyer must be the owner for the time being of the receptacle in which the goods are placed." It has been held that carriers landing goods under the terms of a bill of lading hold them when so landed as carriers.⁶

§ 406.
What
amounts to
delivery.

The cases cited previously as to what constitutes actual receipt and delivery in performance proceed, except as regards mere delivery to an agent to forward, on the same principle as cases in which, the goods having arrived at their destination, the question is whether there has been such delivery as to defeat the right to stop.

¹ *Foster v. Frampton*, (1826) 6 B. & C. 107.

² *James v. Griffin*, 2 M & W. 623, 1 M & W. 20.

³ *Ex parte Rosevear*, (1879) 11 Ch. D. p. 568.

⁴ *Lilladhar v. Wreford*, (1892) 17 B.p.92, which conflicts with the cases as to goods in the Customs House; see *Lyons v. Hofnung*, (1890) 15 A.C. 391: "the goods

must come to the corporal touch of the buyer."

⁵ *Fraser v. Witt*, (1868) 7 Ex. 64.

⁶ *Cossim Hossein, v. Lee Phee Chuan*, (1877) 5 C.L.R. 157 C.A. 5 C. 477; *Hongkong Bank v. Baker*, 7 B. H. C. R. 186, contra *Chin Hong v. Song Mok*, (1875) 4 C. 786, 8 C.L.R. 585. See § 407 at p. 362, 363.

It has been held that the delivery of the bill of lading by the consignee to the captain with instructions to deliver according to cash receipts to be produced by sub-buyers did not, the freight being unpaid, constitute such a delivery as to end the transit although the goods had reached the port of destination.¹

The buyer, unless he has obtained actual delivery, must obtain constructive delivery, that is by the attornment of the bailee, unless there is delivery to his agent to hold which is equivalent to actual delivery.

Constructive delivery.

The transit ends when the carrier or other bailee attorns to the buyer, that is, they mutually agree to the change of character, for no case of constructive possession through a carrier or other forwarding agent arises, unless the carrier enters expressly² or impliedly into some new agreement distinct from the original contract of carriage. This may occur before the goods reach their appointed destination. There is no doubt but that the carrier may and often does become a warehouseman for the consignee, but that must be by virtue of some contract or course of dealing between them that, when the goods arrive at their destination, the character of carrier shall cease and that of warehouseman supervene.⁴

§ 407.
When the
bailee
attorns.

It is established that as a general rule the carrier or other bailee must assent to the change in his position.⁵ For the buyer cannot force the carrier to become his bailee to keep the goods, without the carrier's assent,⁵ at any rate so long as the carrier has any justification for refusing to deliver the goods, as where the demand was

Bailee must assent.

¹ *Kemp v. Falk*, (1882) 7 App. Cas. 573.

² *Ex parte Cooper*, (1878) 11 Ch. D. 68.

³ See *infra* § 411.

⁴ *Bolton v. L. & Y. Ry.*, (1866) 35 L. J. C. P. 187.

⁵ S. of G. Act. s. 45 (3); *Whitehead v. Anderson*, (1842) 9 M. & W. 518; *Jackson v. Nichol*, (1839) 5 Bing. N. C. 508; *Coventry v. Gladstone*, (1868) 37 L. J. Ch. 492; *Kemp v. Falk*, (1882) 7 App. Cas. p. 584, 586.

§ 407. made before the end of the voyage¹ or at an unreasonable spot,² or the delivery order presented was not correctly drawn up,³ but if there is no ground for refusing delivery, such refusal would be ineffectual to prolong the transit,⁴ even if the carrier delivered the goods to the seller's agent⁵ or retook them from the consignee.⁶

Tortious possession.

The effect of the buyer obtaining possession tortiously is discussed *infra*.⁷

Buyer must assent to attornment.

The buyer must also assent to the attornment,⁸ for the carrier cannot without such assent change his character so as to defeat the seller's right; and this is so although the goods have been delivered to the buyer's servants or at his premises without his assent,⁸ for if the buyer refuses to take delivery the right to stop subsists.⁸

Carrier may be responsible as bailee without the transit ending.

On receipt of notice that the carrier holds the goods for the buyer, the buyer's assent thereto is necessary⁹ and may be shown by an attempt to resell,¹⁰ but although the buyer if the carriers give him notice to take delivery and that if he does not, they will hold the goods as warehouseman and charge for them, may become liable for such charges as being put on his election,¹¹ still until he assents to such a change of character the sellers can stop the goods.⁸

¹ *Jackson v. Nichol*, *supra*.

² *Holst v. Pownall*, 1 Esp. p. 242; cf. *Coventry v. Gladstone*, *supra*.

³ *Lackington v. Atherton*, (1844) 13 L. J. C. P. 140.

⁴ *Jackson v. Nichol*, *supra*; S. of G. Act s. 45, (6).

⁵ *Lilladhar v. Wreford*, (1892) 17 B. p. 88; *Bird v. Brown*, (1850) 19 L. J. Ex. 154.

⁶ *G. I. P. v. Hanmandas*, (1889) 14 B. 57.

⁷ See § 412.

⁸ Contract Act s. 100 illus. (1); *Atkin v. Barwick*, (1719) 1 Str. 165; *Salle v. Field*, 5 T. R. 211; *Bartram v. Farebrother*, 4 Bing. 579; *James v. Griffin*; (1837) 2 M. & W. 628; *Bolton v. L. & Y. Ry.*,

(1866) 35 L. J. C. P. 137; *Ex parte Barrow*, (1877) 6 Ch. D. 783; see *Heinekey v. Earl*, (1858) 28 L. J. Q. B. 79 (where the buyer wished to refuse delivery but was advised that he could not).

⁹ *In re Worsdell*, (1877) 25 W. R. 466, set out § 402 n.

¹⁰ *Taylor v. G. E. R.*, (1901) 1 K.B. 774, 6 Com. Cas. 121; see *Ex parte Calling*, (1873) 29 L.T.N.S. 431; see *Ex parte Gouda*, (1872) 20 W.R. 981 (where the buyer on notice of arrival from the carrier signed for it in the carrier's book: held transit ended).

¹¹ *Trent Mining Co. v. Midland Ry.*, (1881) noted in *Butterworth's Railway Rates*, 2nd Ed. Ap. C. 71.

For the carrier may without any intervening act of the consignee become, so far as relates to his own liability, a warehouseman of the goods by tendering them to the consignee at his own address,¹ or by giving notice of arrival, if the consignee fails to take delivery within a reasonable time thereafter,² and where the carrier did not know the consignee's address it was held that a railway company were warehouseman of goods arriving on the 25th which were burnt on the morning of the 27th.³ But in such cases a transit has not ended, for the carrier is still a forwarding agent as far as the transit is concerned until the consignee assents to the carrier being his bailee and it is immaterial that the buyer did not give notice to the carrier that he did not intend to take the goods⁴ and it is clear that if the buyer rejects the goods and the carrier or other bailee continues in possession, the transit is not deemed to be at an end,⁵ even if the seller has refused to take them back.⁶

Rejected
goods.

It was held that it was very doubtful whether an act of marking or taking samples or the like, without any removal from the possession of the carrier, though done with the intention to take possession, would amount to a constructive possession, unless accompanied by such circumstances as to denote that the carrier was intended to keep and assented to keep the goods in the capacity of an agent for custody.⁷ For there must be to constitute constructive possession through a carrier or other bailee a

§ 408.
What
amounts to
attornment.

¹ *Shepherd v. B. & E. Ry.*, (1868) 37 L. J. Ex. 118; *Hough v. L. & N.-W. Ry.*, (1870) 39 L. J. Ex. 48.

² *Bourne v. Gatliff*, (1844), 11 Cl. & Fin. 45 H. L., 8 Scott. N. R. 604; *Mitchell v. Lanc. & Y. Ry.* (1875) L. R. 10 Q. B. 256, 44 L. J. M. C. 107.

³ *Chapman v. G. W. Ry.*, (1880) 5 Q. B. D., 278.

⁴ *James v. Griffin*, (1837) 2 M. & W. 623, 635.

⁵ Contract Act s. 100 illus. (1); see § 413 as to buyer's position if unwilling to accept.

⁶ *Bolton v. L. & Y. Ry.*, (1866) 36 L. J. Ch. 361.

⁷ *Whitehead v. Anderson*, 9 M. & W. 518, cf. *Stoveld v. Hughes*, (1811) 14 East. 308; *Bholanath v. Baij Nath*, (1867) 2 Agra. 11.

§ 408.
Attornment
by carrier.

contract express or implied to become an agent of the consignee for a new purpose.¹ So where the carrier having reached the consignee's premises began to unload on to the consignee's wharf, but hearing the consignee had absconded and was bankrupt, took the goods back into his barge, it was held that the transit was not ended, the buyer not being entitled to possession without payment or tender of the freight and there being no intention on the part of the carrier to deliver without payment.²

Obtaining
documents
not enough.

Even where pledgees of a bill of lading on the ship's arrival obtained from the ship's brokers an overside order for delivery of the cargo, and sent it by their lighterman to the ship and on presentation the ship's officer said that as soon as the cargo could be got at it should be delivered to him, it was held³ that the transit subsisted, the reason given being that there was nothing amounting to attornment.

Mere
demand.

A mere demand for delivery is not enough⁴ before the end of the voyage. So where goods were deliverable in the Thames, and the captain informed the buyer's clerk that if the goods were not taken he would land them at a wharf, and the clerk replied that he had better do so on the buyer's account: but the captain landed the goods and had them entered in the wharfinger's books without any mention of any particular consignee, and subject to freight and charges, that is that the wharfinger should receive

¹ *Whitehead v. Anderson*, 9 M. & W. 518; cf. *Stoveld v. Hughes*, (1811) 14 East. 308; *Bholanath v. Baij Nath* (1867), 2 Agra 11.

² *Crawshay v. Eades*, (1823) 1 B. & C. 181; cf. *Ex parte Cooper*, (1879) 11 Ch. D. 68 C.A.; *Ex parte Barrow* (1877) 46 L. J. Bk. 71, 6 Ch. D. 788 (buyer absconded).

³ *Coventry v. Gladstone*, (1868) 37 L.J. Ch. 492; Campbell 2nd Ed. 488, says this case and *Jackson v.*

Nichol, 5 Bing. N.C. 508, turned on the fact that the lighterman was only another agent to forward to the original destination. This is doubtless so in *Jackson's* case where the lighter was sent by the ship's wharfingers, but in the other case it seems there was no attornment.

⁴ *Bholanath v. Baij Nath*, (1867) 2 Agra. 11.

payment thereof before delivery, it was held the wharf not being the buyer's or his agent's, and there being no intention to deliver without payment of freight, the transit subsisted.¹ § 408.

The existence of the carrier's lien for unpaid freight though not inconsistent with attornment raises a strong presumption that the carrier continues to hold as carrier and not as warehouseman,² and to overcome this presumption there must be evidence of an explicit agreement³ or course of dealing⁴ to make the carrier a bailee. It is not sufficient if the captain says he will deliver when he is satisfied about his freight.⁵ Freight unpaid.

And where a carrier accepts payment of freight from the consignee, this would raise a strong presumption that he intended to attorn,⁶ but has been held not of itself to put an end to the transit.⁷ It was held when a railway company accepted freight from the holder of a railway receipt and it was not until the goods had been loaded into his carts, that the Company's servants detained the goods on notice to stop, that the Company having divested themselves of their lien as carriers, there being no suggestion that the matter between the Company Where carrier accepts freight.

¹ *Edwards v. Brewer*, (1837) 2 M. & W. 375; cf. *James v. Griffin*, (1837) 2 M. & W. 623 (where the buyer directed delivery at a wharf but had no intention of taking possession) and cases of goods landed at the Customs House, duty not being paid, see § 402; *Northey v. Field*, (1798) 2 Esp. 613.

² *Allan v. Gripper*, (1832) 2 Cr. & I. 218, 1 L. J. Ex. 71; *Crawshay v. Eades*, (1823) 1 B. & C. 181; *Ex parte Barrow*, (1877) 6 Ch. D. 783; *Ex parte Cooper*, (1879) 11 Ch. D. 68; *Kemp v. Falk*, (1882) 7 Ap. Ca.

p. 584; see *Jackson v. Nichol*, (1839) 5 Bing. N. C. 508.

³ *Foster v. Frampton*, (1826) 6 B. & C. 107.

⁴ *Dodson v. Wentworth*, 4 M. & G. 1080.

⁵ *Whitehead v. Anderson*, (1842) 9 M. & W. 518.

⁶ *G. I. P. v. Hanmandas*, (1889) 14 B. 57; *Bird v. Brown*, (1850) 19 L. J. Ex. 154; *Lilladhar v. Wreford*, (1892) 17 B. p. 88.

⁷ *Crawshay v. Eades*, 25 R. R. 343; *G. I. P. v. Hanmandas*, (1889) 14 B. 57.

and the consignee had not been fully settled, the consignor could no longer stop in transit.¹

Where
freight paid
for part.

If part of a cargo is delivered, freight being unpaid as to the rest, the presumption is that the remaining goods being still subject to the carrier's lien for freight, are in his possession as carrier and the transit is not ended as to them.²

§ 409.
Delivery of
part.

Except in circumstances like those in *Crawshay v. Eades*,³ where part delivery was retracted, part delivery of the goods made to the buyer or his agent in that behalf ends the right to stop such part, but the remainder of the goods may be stopped in transit,⁴ unless such delivery has been made under such circumstances as to show an agreement to give up possession of the whole of the goods.⁵

This point is governed by the same principles as apply to section 90 of the Contract Act. The party who asserts that part delivery is tantamount to constructive delivery of the whole must prove it.⁵ The mere fact that a delivery order for the whole is given is not conclusive as the buyer may intend only to take part.⁶ The buyer may however at the time express his intention to take the whole⁷ and if the assignee of the buyer takes part that is generally with the intention to take the whole,⁸ so if an essential part of a machine is taken, an agreement to deliver the rest is to be inferred.⁸

¹ *G. I. P. v. Hanmandas*, (1889) 14 B. 57.

² *Ex parte Falk*, (1880) 14 Ch. D. 448 C. A.; on appeal *Kemp v. Falk*, 7 A. C. 573, 584.

³ (1828) 1 B. & C. 181.

⁴ *Peacock v. Baijnath*, (1890) 18 C. 577.

⁵ S. of G. Act 45 (7), cf. Contract Act s. 90; *Dixon v. Yates*, 5 B. & Ad. 313; *Bunney v. Poyntz*, 4 B.

& Ad. 568; *G.I.P. v. Hanmandas*, (189) 14 B. 57; *Wentworth v. Outhwaite*, 10 M. & W. 436; *Kemp v. Falk*, 7 Ap. Ca. 573; *Ex parte Chambers*, 42 L. J. Bk. 37.

⁶ *Tanner v. Scovell*, (1845) 14 M. & W. 28.

⁷ *Ex parte Cooper*, (1879) 11 Ch. D. 63.

⁸ *Jones v. Jones*, (1841) 8 M. & W. 431.

The right does not revive if the goods are returned by the buyer to the seller for repacking.¹

§ 410.
Right does not revive if goods returned.

The buyer may end the transit at any point previous to their arrival at the appointed destination by obtaining delivery of the goods.² This was generally considered to be the Common Law,³ and it was so decided in 1861⁴; but the case did not relate to a transit. If the carriers assent to an alteration of the destination directed by the buyer, the transit is ended⁵ and it seems that the same result follows if the carrier agrees before the goods arrive at their destination to hold them as bailee for the buyer, unless there was collusion between them in order to defeat the seller's rights. But no such agreement has been inferred from the fact that the carriers issue bills of lading in the buyer's name or fresh bills of lading to him,⁶ or that the ship's agents gave an overside order for delivery to the buyer's pledgee on the ship's arrival at the appointed destination.⁷ For such circumstances have not been regarded as amounting to an attornment, for the possession is still constructive and the carrier himself has not thereby become the buyer's bailee. The buyer being entitled to possession under the contract is also entitled to any documents authorising delivery, but the right to stop on insolvency is paramount to any right given by the contract so long as the buyer has not perfected his right to possession, by actually obtaining delivery or constructive possession by virtue of a new contract, for the privity of contract with the seller's bailee for

§ 411.
Delivery previous to arrival.

Attornment before arrival.

Documents authorising delivery.

¹ *Valpy v. Gibson*, (1847) 16 L. J. C. P. 241, 4 C.B. 837.

² Section 106 shows this.

³ *Mills v. Ball*, (1801) 2 B. & P. 457; *Whitehead v. Anderson*, (1842) 9 M. & W. p. 534, see *James v. Griffin*, 2 M. & W. p. 633.

⁴ *The London and N. W. Ry. v. Bartlett*, (1861) 31 L.J. Ex. 92; see

Cork Distilleries Co. v. The G. S. Ry., (1874) L.R. 7 E. & I. Ap. 269; see now S. of G. Act. s. 45 (2).

⁵ See *Morton v. Tibbett*, 15 Q.B. 428, for that is actual receipt.

⁶ *Lyons v. Hoffnung*, (1890), 15 A.C. 391 P.C.

⁷ *Coventry v. Gladstone*, (1868) 37 L.J. Ch. 492.

carriage is not transferred with the right to possession and property.¹

While goods
at sea.

It is not clear whether the buyer and carrier can end the transit by agreement while the goods are on the voyage, that is actually at sea. It was held that he could not.² But it is said that under later rulings he can.³

§ 412.
Tortious
possession.

In *Blackburn*⁴ on 'Sale' the opinion expressed in *Whitehead v. Anderson*,⁵ that even if the buyer, before the goods arrive at the appointed destination, obtain possession tortiously against the will of the carrier, the right to stop is defeated, is doubted, for the law does not favour violence. This doubt is confirmed by *Bird v. Brown*,⁶ a converse case of the carrier wrongfully refusing to deliver.

Where
destination
part of the
contract.

It has never been decided, but it seems probable⁷ that the buyer cannot, if it is part of the contract that the goods shall be sent to a particular place, defeat the right by any dealing with or by obtaining delivery of the goods previous to their arrival at the expressly appointed destination, at any rate when the contract secures the seller an interest in the goods after shipment. But it seems that the buyer's banian⁸ taking possession of goods without notice of an express trust would not be bound by it.

§ 413.
Insolvent
buyer's
position.

In certain cases a buyer being aware of his pending insolvency has tried to assist the sellers by prolonging the transit. If he rejects the goods this may give rise either to a prolonging of the transit, or to a state of things having a nearly though not necessarily quite

¹ *Blackburn*, 3rd Ed. 362.

² *Holst v. Pownall*, 1, Esp. 240.

³ 'Carver on Carriers,' 4th Ed. 621.

⁴ Page 259.

⁵ (1842) 9 M. & W. 534.

⁶ (1850) 4 Ex. 786; see *Benj.* 5th Ed. 908, a contrary view is taken in *Kerr on the Sale of Goods Act*, where it is said the Sale of Goods

Act confirms the dictum in *Whitehead v. Anderson*; see too *Carver on 'Carriers'*, 4th Ed. 621.

⁷ Cf. *Ex parte Watson*, (1877) 46 L. J. Bk. 97, 5 Ch. D. p. 43; *Carver on 'Carriers'*, 4th Ed. 620 holds this view.

⁸ See per High Court in *Peacock v. Baijnath*, 18 C. 577.

similar effect as an effectual stoppage. On the arrival of goods in such circumstances the insolvent may (1) accept them so that they become part of his general assets, leaving the seller to come in as a creditor¹; (2) he may decline to take possession so as to prolong the transit and give the seller a chance of stopping the goods²; (3) he may take possession of them not for his own benefit, but to keep them for the seller, and then the transit is not at an end, for it only ends when the buyer takes possession as owner.³ But after he has taken possession as owner, he cannot if insolvent return the goods, for that would be a fraudulent preference.⁴ But where an insolvent buyer returned a bill of lading to the seller it was held that even if that were a fraudulent preference it was void for all purposes and the goods being in transit the right to stop subsisted.⁵

When buyer rejects goods.

If without any intention of assisting the unpaid seller, the buyer rejects goods when offered to him by the carrier the transit is not ended,⁶ if the carrier continues in possession. It is immaterial that the buyer has not given notice to the carrier that he does not intend to take them if he does not assent to the carrier becoming his bailee.³

The mere fact that the buyer is insolvent does not prevent him if he can from obtaining possession of the goods, and his assignee has the same right,⁷ and may also

§ 414
Bankruptcy does not end the right.

¹ *Heinekey v. Earl*, (1858) 28 L.J. Q.B. 79.

² Contract Act s. 100 illus. (1); See *Hutchings v. Nunes*, 1 Moo. P. C. N. S. 248; *Bartram v. Farebrother*, (1828) 4 Bing. 579; 29 R.R. 639.

³ *James v. Griffin*, 2 M. & W. 623. See § 407.

⁴ *Stephenson v. Wilkinson*, (1831) 2 B. & Ad. 320. Before insolvency or possession both parties may rescind the contract, *Bartram v. Farebrother* supra.

⁵ *Re O'Sullivan Ex parte Ferd*

61 L.J.Q.B. 228 per Collins J. on appeal (67 L. J. 464) it was held there was no fraudulent preference.

⁶ Contract Act s. 100 illus. (2). S. of G. Act 47, 3. *James v. Griffin*, (1836) 1 M. & W. 20, 46 R.R. 243; *Bolton v. L. & Y. Ry.*, (1866) L. R. 1 C.P. 481.

⁷ *Ellis v. Hunt*, (1789) 3 T. R. 464; *Scott v. Pettit*, (1803) 3 B. & P. 469; *Inglis v. Usherwood*, (1801) 1 East 515; *Bohtlingk v. Inglis*, (1803) 3 East. 381.

§ 414. it seems defeat the right to stop by obtaining possession of the goods before they arrive at their appointed destination, and in an early case it was said "and I will not say but that his (the buyer's) creditors in the case of an execution against him may have the same right."¹

Section 101. The seller's right of stoppage does not, except in the cases hereinafter mentioned, cease on the buyer's reselling the goods while in transit, and receiving the price, but continues until the goods have been delivered to the second buyer, or to some person on his behalf.

Section 102. The right of stoppage ceases if the buyer, having obtained a bill of lading or other document showing title to the goods, assigns it, while the goods are in transit, to a second buyer, who is acting in good faith, and who gives valuable consideration for them.

Illustrations.

(a) *A* sells and consigns certain goods to *B*, and sends him the bill of lading. *A* being still unpaid, *B* becomes insolvent, and while the goods are in transit, assigns the bill of lading for cash to *C*, who is not aware of his insolvency. *A* cannot stop goods in transit.

(b) *A* sells and consigns certain goods to *B*, *A* being still unpaid. *B* becomes insolvent, and, while the goods are still in transit, assigns the bill of lading for cash to *C*, who knows that *B* is insolvent. The assignment not being in good faith, *A* may still stop goods in transit.

§ 415. The right to stop cannot be defeated by any dealing with the goods themselves² short of giving possession

How defeated. Dealing with the goods.

¹ *Oppenheim v. Russell*, (1802) 3 B. & P. 42, *sed quare* for actual attachment was held insufficient, *Bholanath v. Baijnath*, (1867) 2 Agra H. C. 11, but see § 377.

² *E.g.*, a sale before docu-

ments of title are issued, though it might be effected on subsequent assignment after obtaining possession of the documents, *Moakes v. Nicholson*, (1865) 34 L. J. C. P. 273.

thereof actual or constructive¹ to the buyer or some one on his behalf who holds them otherwise than as agent for the purpose of transit, except in the case of estoppel by assent to a sub-sale² unless there is a transfer of a document of title under section 102 or a pledge under section 103.³ § 415.

It is not the mere assignment of a document of title⁴ but an assignment in pursuance of a sale or pledge that defeats the right. This is the English rule,⁵ and the Privy Council held that where a consignee endorsed over bills of lading to his banian who gave no value for them and had no lien thereon, but held them qua agent of the consignee, the banian had no right to object to the action of the consignor who stopped the goods in transit.⁶ The section shows that valuable consideration must be given "for them," that is, the goods. § 416. Mere assignment of document of title.

It has however been suggested that an assignment of the goods without a transfer of documents of title is sufficient to defeat the seller's right.⁷ In the cases cited there had been a transfer of a bill of lading, but not being stamped it was inadmissible in evidence and Blackburn suggests that the law was strained to avoid the harsh consequences of the most clumsy and unjust provisions of the English stamp law.⁸ A similar view was taken in *Ex parte Golding*,⁹ i.e., the right to stop can only be exercised provided it does not interfere with the rights of third Assignment of goods whether effective.

¹ See under "Delivery."

² See § 381.

³ *Sewell v. Burdick*, (1884) 10 A. C. p. 100, 101.

⁴ See Blackburn, 3rd Ed. 423.

⁵ *Patten v. Thompson*, (1816) 5 M. & S. 350; cf. *Lilladhar v. Wreford*, 17 B. 73.

⁶ *Peacock v. Baijnath*, 18 C. p. 584.

⁷ Carver on "Carriers," 4th Ed. 628, citing *Davis v. Reynolds*, 4 Camp. 267; *Dick v. Lumsden*, Peake N. P. C. 189.

⁸ 3rd Ed. 358, explaining *Davis v. Reynolds*.

⁹ 1880, 13 Ch. D. 628 C. A. approved in *Ex parte Falk*, (1880) 14 Ch. D. 446 C. A., reversed sub nomine *Kemp v. Falk*, (1882) 7 A. C. 573.

§ 416. parties. But this conflicts with the view taken in the House of Lords where that case was discussed.¹ And it seems that the weight of authority is against there being such a rule and that the true explanation of *Ex parte Golding*² is that it affirms a sub-buyer's right to obtain the goods by paying off the original seller.

In India section 101 is express on the point, and by analogy section 98 is against any such rule.

§ 417.
Documents
of title.

The question of the meaning of the words "documents of title"³ was discussed in a Bombay case. The original Court held that in the absence of any definition of a document of title in the Contract Act itself, section 4 of Act XX of 1844 by which the English Factors Act 5 & 6 Vic. c. 37 was extended to India, might be properly accepted as a guide to the meaning of the expressions "documents showing title to goods" (*i.e.* section 108) or "instruments of title to goods." The Appeal Court, however, held that however much that definition might assist in construing the expression "documents showing title" in section 108 of the Contract Act which was virtually substituted for the Factors Acts and in *pari materia*, it cannot properly be used in construing the expression "instrument of title" in section 103, which relates to an entirely different subject matter from the Factors Acts,⁴ and that it is therefore more reasonable to presume that in a matter of such general commercial importance, the framers of the Contract Act intended to leave the terms "document of title" in section 103 to be construed with reference to the

¹ *Kemp v. Falk*, (1882) 7 A. C. pp. 577, 582.

² 1880, 13 Ch. D. 628 C. A. approved in *Ex parte Falk*, (1880) 14 Ch. D. 446 C. A., reversed sub nomine *Kemp v. Falk*, (1882) 7 A. C. 573; *Bellamy v. Davey*, (1891) 3 Ch. 540.

³ See § 423.

⁴ *Sed quære*; there is no such

distinction in England; see Benj. 5th, p. 919, but though the buyer can give his sub-buyer a good title, under s. 108, it is not clear that he can thereby defeat a right to stop the goods. But Sargent, C.J., considered a purchaser was not within s. 108: *Harvey v. LeGeyt* 8 B. 501; see § 477.

decisions in force in the English Courts¹ when the Contract Act was passed ; the principal decision being that of the Exchequer Court in 1846 in *Farina v. Home*² where it was held that a delivery warrant signed by a wharfinger, whereby the goods were made deliverable to the plaintiff or his assignee by endorsement, was no more than a token of authority to receive possession and that there had been no constructive delivery to the assignee until the wharfinger had attorned to the assignee and agreed with him to hold the goods for him. Accordingly railway receipts,³ although amounting to delivery orders, were held not to be instruments of title within section 103.⁴

Documents of title.

Wharfinger's warrant.

Railway receipts.

This ruling⁵ by Sargent, C.J., is cited without comment by the Indian text-writers, but seem to be entirely wrong. On the face of it to construe words which are found in two sections in the same chapter as meaning one thing in one place and another in the other requires some justification. This view seems to assume that a purchaser in possession of documents of title is not within section 108, exception 1, which was expressly decided by the same learned Judge.⁶ Sargent, C.J., was a commercial lawyer of the highest attainments, and his views are always of great weight. And if a purchaser is not within the meaning of section 108,⁷ his reasoning is difficult to meet. But the difficulty is that there seems to be no meaning left for the words "other documents of title" in the section. The omission of the list of documents mentioned in section 108 would have been significant and the words "other documents showing title to goods" might have been intended to be confined to such as relate to goods in

¹ Seem to be as being the Common Law in force in India.

² 16 M. & W. 119, 73 R. R. 438.

³ These had previously to this decision been included as documents of title in the Transfer of Property Act, 1882.

⁴ *G. I. P. v. Hanmandas*, (1889) 14 Bom. 57, 66-69.

⁵ *G. I. P. v. Hanmandas*, supra.

⁶ *LeGeyt v. Harvey*, (1884) 8 B. 501, but see *infra* under s. 108.

⁷ See under § 108, exception 1.

Documents
of title.

transit, but any of the documents in section 108 might relate to goods in transit.

Section 102
and section
108 relate to
different
points.

But the two sections do not refer to the same point ; section 108 makes a sale valid to transfer the ownership if it comes within the exceptions, whereas section 102 and 103 are concerned with the conditions under which a seller's right to stop is affected.¹ A buyer has a right to sell the goods, and passes the ownership by the sale, but it does not follow that he thereby defeats the seller's right to stop : his rights of sale are not enlarged by section 108 exception 1. If any meaning can be assigned to "other documents of title" in section 102 and section 103 in contradistinction to that expression in section 108, the view of Sargent, C. J., seems sound.

Conditions
under s. 108
and s. 108.

Further the conditions under sections 102 and 103 are not the same as in section 108, exception 1. To affect the right to stop there must be an assignment of a document of title while the goods are in transit, but a possessor of documents of title can transfer the ownership under section 108, exception 1, without assigning the documents. And whereas under sections 102 and 103 the assignee must act in good faith and give value consideration, under section 108, exception 1, the "buyer" must besides acting in good faith in addition have no reasonable ground for presuming that the seller has no right to sell the goods : a proviso which is unmeaning as regards a buyer who has a right to sell : and there is in exception 1 nothing about valuable consideration, which is left to be inferred from the words "buyer acting in good faith."

Further exception 3 to s. 108 which deals with possession of goods under a voidable contract, is not extended to possession of documents of title : and it is essential that

¹ See Carver on 'Carriers,' 4th Ed. 688, where *Cahn v. Pockett*, (1899) 1 Q. B. is criticised. In that case the argument of Cohen, K. C., as to such a distinction was rejected on the wording of the English Acts.

the contract under that exception should not be voidable for an offence, which does not apply to section 102. Similarly as regards section 178 the conditions of a valid pledge are not the same as in section 103 ; there is no need for an advance to be made specifically upon the document, and if the document is obtained by an offence or fraud no pledge can be made thereof, which is not so enacted under section 103,¹ though the buyer must have possession of the documents to defeat a right to stop.

§ 417.

This distinction seems to have been made by Sargent, C. J.,² who contrasted section 108, exception 1, with the Factors Act of 1877 under which he said a seller's lien was defeated by a transfer of a document of title.³

On this point English cases must be referred to with caution as the law depends there on different legislation.⁴

At Common Law the right to stop could only be defeated by the assignment of a bill of lading, which was negotiable by custom of merchants to this extent only, *i.e.*, against the right to stop.⁵ The law as to bills of lading is now governed in India partly by the law merchant and partly by the Bills of Lading Act, IX of 1865. Under that Act the following provisions are made :—

Bills of lading.

Section 1.—Every consignee of goods named in a bill of lading and every endorsee of a bill of lading to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or endorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.⁶

Bills of lading act.

¹ See § 420.

² *LeGeyt v. Harvey*, (1884) 8 B. 501, 510.

³ By s. 5 re-enacted in England by s. 10 of the Factors Act of 1889, but repealed by the Contract Act in India ; see also § 423.

⁴ See *G. I. P. v. Hanmandas*,

(1889) 14 Bom. 57 ; and *Naganda Davay v. Bappu*, (1908) 27 M. 424 (bench).

⁵ *Fluentes v. Montes*, (1868) L. R. 3 C.P., p. 276.

⁶ For the rule in England, see *Scwell v. Burdick*, (1884) 10 A. C. 74.

§ 417.

Section 2.—Nothing herein contained shall prejudice or affect any right of stoppage *in transitu* or any right to claim freight against the original shipper or owner, or any liability of the consignee or endorsee by reason or in consequence of his being such consignee or endorsee or of his receipt of the goods by reason or in consequence of such consignment or endorsement.

§ 418.
The transfer must be by the buyer.

The bill of lading or other document of title must be obtained by the buyer under the contract of sale and must relate to ascertained goods,¹ and the buyer² must assign and transfer it to a third party who acts *bona fide* and gives value for it. The right to stop is not affected by a transfer by the seller to the buyer³ or by the fact that the bill of lading is issued in the first instance to the buyer⁴ or without the seller's privity to a sub-buyer.⁵

§ 419.
Onus of proving value.

The onus of proving that a transfer was for value would, it seems, come within the rule that the party with special means of knowledge of a fact must prove it; where however the plaintiff was a sub-endorsee, and it was contended that the first transfer was not for value, the onus was held to be on the defendant, the seller, who alleged that no value was given.⁶

§ 420.
Bills of Lading.

It is only proposed to consider the transfer of a bill of lading as regards its effect on the right to stop; for the general law *see* the notes to *Lickbarrow v. Mason*.⁷

Lawfully transferred.

It seems clear that in India as in England⁸ the bill of lading must be lawfully transferred. The document

¹ But *see* § 484.

² This was the Common Law and is the present English Law, Benj. 5th Ed. p. 916.

³ *The Tigress*, (1868) 32 L. J. Adm. 97.

⁴ *Lyons v. Hoffnung*, (1890) 15 A. C. 291 P. C

⁵ *Ex parte Golding*, (1880) 13 Ch. D. 628, and *see* § 381.

⁶ *Dracachi v. The Anglo-Egyptian*

Navigation Co., (1868) 37 L. J. C. P. 71. *Sed quære* for the onus of proving there is no right to stop is on the party disputing it, *Wood v. Jones*, 7 Davl. & R. 126 *The Tigress* 22 L. J. adm. p. 101.

⁷ Sm. L. C. 9th Ed. 737, 11th Ed. 715.

⁸ Benjamin, 5th Ed. p. 919.

must therefore be transferred in a manner appropriate to the instrument, as by endorsement and delivery, or by mere delivery as the case may be. According to Scrutton¹ it is only bills of lading "to order" or to "order or assigns" that are quasi-negotiable by endorsement. If endorsed in blank it passes by delivery. But if endorsed in full without the words "to order or assigns" it is not² a quasi-negotiable instrument,³ but such omission does not amount to constructive notice of an equitable assignment,³ but if assigned, only an equitable title passes which, unless the legal title is acquired, is subject to prior equities.³ The fact that the bill of lading was signed by the master before the quantity was filled in does not render it non-negotiable.⁴ The effect of the endorsement depends entirely on the circumstances.⁵

§ 420.

Where not endorsed to order or assigns.

The transfer must be by a person having authority actual or statutory, *i.e.* under section 108, to transfer. If the document is stolen from or lost by the owner, even if endorsed in blank, the finder or thief can confer no title on an honest third person.⁷ But if the seller actually transferred the instrument under a contract to the buyer although induced to do so by the buyer's fraud, not

By person with authority to transfer.

Stolen.

¹ On Bills of Lading, 6th Ed.

v. Hertz, (1871) L. R. 2 Sc. Ap. p. 119; *see* § 484.

² Carver on "Carriers," 4th Ed. p. 540, suggests that it is, citing *Sewell v. Burdick*, 10 A. C. p. 83, and comparing negotiable instruments.

⁴ *Cowdenbrath Coal Co. v. Clydesdale Bk.*, 22 Sess. Ca. (4th) 682.

³ *Henderson v. Comptoir d'Escompte*, (1873) L. R. 5 P. C. 253, 260; *Chartered Bk. of India v. Henderson*, (1874) L.R. 5 P. C. 501, but it would be a document of title under s. 108; *see Vickers*

⁵ *Sewell v. Burdick*, (1884) 10 A.C. 74; Scrutton, 6th Ed. p. 154. But *see* Act IX. of 1865 set out in § 417.

⁷ *Gurney v. Behrend*, (1854) 23 L. J. Q. B. 265.

Bell of lading obtained by fraud.

amounting to larceny¹ by a trick, the title of a *bona fide* third party will prevail,² for the contract is only voidable.

In *Pease v. Gloahec*³ the property was in the buyer, he acquired nothing by his fraud (a false representation), but the means of disposing of that which was already his own; it was not therefore a case of a buyer who sought to give a greater title to goods than he himself possessed.⁴

The rule is that if there is an agreement to give possession though it may be voidable, yet until avoided the buyer can give a good title, secus if there was no agreement at all,⁵ as where buyers obtained bills of lading from the carrier direct by fraud.⁶

Where a bill of lading was given to the buyer by the mistake of a clerk who had however authority to deliver it, it was held that the pledgee without notice had a good title.⁷ But it does not seem that the buyer was really in a better position than if he had stolen the bill, for the clerk never exercised his authority to deliver. The case conflicts with the observations in *Gurney v. Behrend*.⁸

§ 421.
Condi-
tional
endorse-
ment.

If the endorsement on a bill of lading is conditional, all endorsees take it subject to such condition, and have no title to the goods unless it is performed.⁹ For the document of title must show title to the goods.

So where under a bill of lading the goods were to be delivered provided *E.F.* paid a certain draft, every endorsee was held to take it subject to that condition and to have

¹ *Cahn v. Pockett*, (1899) 1 Q. B. 37 L. J. Ch. 80 L. R. 4 Eq. 498. p. 658, 659 C. A.

² *Ryaram v. M.B. Brown*, (1870) 7 B.H.C. o.c. 97; *Pease v. Gloahec*, (1866) L. R. 1 P. C. 219.

³ (1866) L. R. 1 P. C. 219.

⁴ See per Sale, J., in *Juggernaut Agarwallah v. Smith*, (1906) 38 C. 547.

⁵ See § 108 ex. 3.

⁶ *Schuster v. McKellar*, (1857) 26 L. J. Q. B. 281.

⁷ *Coventry v. Gladstone*, (1867)

⁸ 28 L. J. Q. B. 268.

⁹ *Barrow v. Colles*, (1811) 3 Camp. 92, 13 R. R. 763; *Wilms-hurst v. Bowker*, (1843) 12 L. J. Ex. p. 475; See *The Charlotte*, (1908) P. 206 C. A.; 77 L. J. P. 132. But see *Barton v. Boddington*, 1. C. & P. 207. where it was held that a condition (for weighing) on a delivery order was subject to a custom not to weigh, *sed quaere* for custom contradicted the writing.

no title to the goods unless it was performed.¹ But it seems that the endorsee, to be bound thereby, must have notice of any condition precedent or trust affecting the goods² if the assignment passes the legal title,³ but if the assignment passes only an equitable title as where the bill is not to order or assigns, until the legal title is acquired, the assignee holds subject to prior equities.⁴ The transfer of a bill which represents no goods is inoperative,⁵ for it only operates as a transfer of the goods represented⁶ and if the bill has ceased to represent the goods its transfer is also ineffective.

Knowledge of condition necessary.

Bill of lading must represent goods.

The moment at which the transit ends and the quasi-negotiability of a bill of lading ceases is sometimes difficult to determine. A bill of lading remains the only symbol of property in imported goods until the wharfinger's certificate or warrant is issued or a holder of a delivery order for the goods obtains the goods, or presents it and on its being recognised leaves the goods with their bailee as his bailee, whereupon its negotiability ceases. But the mere landing of the goods does not affect it. It has been held that an endorsement after the goods were landed and warehoused at a sufferance wharf under a stop for freight, gave a *bona fide* pledgee a good title.⁷ And where the goods were wrongly delivered without any document being produced, a pledgee of the bill of lading even though

§ 422.
Period during which a bill of lading can be transferred.

Where holder's title accrued after wrongful delivery.

¹ Sm. L. C. Vol. 1, 756, 11th Ed.; *Barrow v. Coles*, 8 Camp. 92; cf. *Gurney v. Behrend*, 23 L.J.Q.B. p. 272; *The Argentina*, L. R. 1, A. & E. 870.

² See per High Court in *Peacock v. Baijnath*, 18 C. 577; as to what amounts to a trust, see § 374; as to what amounts to notice, see § 425.

³ *Chartered Bank of India v. Henderson*, (1874) L.R., 5 P.C. 501.

⁴ *Henderson v. Comptoir d'Escompte de Paris*, (1873) L.R. 5 P.C. 258.

⁵ *Bryans v. Nix*, (1839) 8 L. J. Ex. 137; *J. C. Shaw v. Bell*, (1884) 8 M. 38.

⁶ *Grant v. Norway*, (1851) 10 C.B. 665 (Captain signing bills without receiving the goods).

⁷ *Meyerstein v. Barber*, (1866) L.R. 2 C.P. 38, (1870) L.R. 4 H.L. 317, 39 L.J. C. P. 187; see *Lillardhar v. Wreford*, (1892) 17 B. 62,

his title accrued after the wrongful delivery was held entitled to sue for the goods.¹

As to the effect of endorsing two bills of lading *see* under delivery.²

**§ 423.
After
payment.**

After the price has been paid the sellers retaining bills of lading hold them as trustees for the buyer freed from any lien or claim on their part,³ but whether such documents remaining in the hands of the sellers are documents of title within the meaning of section 108 is a doubtful point.⁴

**Other
documents
of title.**

What the expression 'other documents of title' means is doubtful.⁵ The words were not in the original draft. Mates' receipts,⁶ shipping notes⁷ and cash receipts are⁸ not documents of title. But apparently any documents might become a document of title by trade usage.⁹

**§ 424.
Documents
of title
must relate
to ascer-
tained
goods.**

It seems quite clear that any document of title must relate to ascertained goods in order to avail by transfer against the seller's rights,¹⁰ unless of course the seller has estopped himself from setting up such a case. And if there are no goods to which such a document relates it is of no effect¹¹ apart from estoppel.¹⁰

¹ *Bristol Bank v. M. Ry.*, (1891) 2 Q.B. 653.

² § 243.

³ *Lilladhar v. Wrcford*, 17 B. p. 80, cf. *Cowasjee v. Thompson*, (1845) 5 Moo. P.C. C. 165, 3 Moo. I.A. 422.

⁴ *See* notes to section 108.

⁵ *See* § 417.

⁶ *Juggernath Agarwallah v. Smith*, (1906) 34 C. 173.

⁷ *Akerman v. Humphrey*, (1828) 1 C. & P. 53.

⁸ *Kemp v. Falk*, (1882) 7 A.C. 573.

⁹ *See Merchant Banking Co. v. Phoenix*, 5 Ch. D. 205; *Anglo-India Jute Mills v. Omademull*, (1910) 38 C. 127 C.A.

¹⁰ *See per Fletcher, J. in The Anglo India Jute Mills Co. v. Omademull*, (1910) 38 Calcutta 217 C.A.; on appeal this view seems to be approved; cf. *I. C. Shaw v. Bell*, (1884) 8 M. 38, but *see* § 484.

¹¹ *Bryans v. Nix*, (1839) 8. L.J. Ex. 137; *I.C. Shaw v. Bell*, (1884) 8 M. 38; and as to cases where a captain signs a bill of lading without the goods being on board *see* Contract Act s. 238 illus. (b); *Grant v. Norway*, 10 C. B. 665; *Coleman v. Reekes*, 16 C.B. 104; *Whitechurch v. Cavanagh*, (1902) A.C. 117; *Rubens v. Great Fingall Co.*, (1906) A C. 489.

The term "in good faith" has been defined by the Sale of Goods Act¹ to mean if done honestly whether negligently² or not.³ This does not mean without notice that the goods have not been paid for,⁴ but without notice of such circumstances as render the bill not fairly and honestly assignable,⁵ for instance if the buyer and a third person collude to defeat the right,⁶ or if the sub-buyer knew of the buyer's insolvency.⁷

§ 425.
Bona fide.

The fact that a pledgee knew that his pledgor was not owner of the goods pledged, but an agent for sale, does not generally invalidate a pledge⁸ or sale of documents of title. The test applied by the Privy Council to the case of an agent pledging goods is a proper criterion in these cases. Their lordships quoted with approval the form of question left to a jury in like circumstances, "whether the circumstances are such as that a reasonable man and a man of business, applying his understanding to them, would certainly know that the agent had not authority to make the pledge, if not also that he was acting *mala fide* in respect thereof against his principals." ⁹

Where a man is put on informing himself he is in the same position as if he had notice.¹⁰ In the absence of notice a pledge or other disposition of documents defeats

¹ Section 62 (2).

² *Gilbert v. Guignon*, (1872) 8 Ch. App. 16.

³ But probably the terms used in section 108 ex. 1 of the Contract Act apply. See § 486.

⁴ *Cuming v. Brown*, (1808) 9 East. 506; see per Calcutta High Court in *Peacock v. Baijnath*, (1891) 18 C. 577.

⁵ *Salomons v. Nissen*, (1788) 2 T.R. 674, 681.

⁶ *Cuming v. Brown*, (1808) 9 East. 506; see *Rosenthal v. Dessau*,

(1877) 11 Hun. (N.Y.) 49.

⁷ See *Vertue v. Jewell*, 5 M. & 850 4 Camp. 3, and Contract Act s. 102 illus. (b).

⁸ *Peacock v. Baijnath*, (1891) 18 C. 577.

⁹ *Gobind Chander Sein v. The Ad. Gen. of Bengal*, (1861) 1 Ind. Jur. O.S. 17 (P.C.); see *Rodger v. The Comptoir d'Escompte*, L.R. 2 P.C. 404.

¹⁰ *Rankin v. Potter*, (1878) L. R. 6 H. L. p. 138, see § 486.

the right *pro tanto* even if there is an express trust to hold the proceeds to protect bills.¹

But notice and good faith are distinct from one another, and though the standard of the reasonable man may be the test of notice, it cannot be properly referred to in order to decide what is good faith.²

Where an endorsee took a bill of lading agreeing himself to pay the original seller, and did not do so, it was held that he was not a *bona fide* endorsee for value.³

**§ 426.
Position of
endorsee.**

The endorsee is not affected by any equity arising out of the original agreement between the vendor and the endorser of which he has no notice, as where the vendor's claim that the endorser held the proceeds of the sale in trust for them.⁴

Where two
bills of lading
are pledged.

The first person who for value gets a transfer of a bill of lading though it be only one of a set of three bills acquires the property, and all subsequent dealing with the other two bills must in law be subordinate to the first one,⁵ but that does not render a master or wharfinger liable if he delivers the goods on the first bill of lading which is presented to him without notice of any other claims.⁶

Goods must
be in transit.

The transfer must be made while the goods are in transit.⁷ Section 102 expressly provides for this and semble the same condition applies to pledges under section 103. Therefore, even if a buyer is within exception 1 to section

¹ See *Peacock v. Baijnath*, (1891) 18 C. 573 (for a pledgee with notice).

² *Whitehorn v. Davidson*, (1911) 80 L.J.K.B. 431, 437.

³ *Salomons v. Nissen*, (1788) 2 T.R. 674, 681, where the endorsee was a partner with the buyer.

⁴ *Henderson v. The Comptoir d'Escompte*, (1878) L.R. 5 P.C. 253, 42 L.J. P.C. 60; cf. *Peacock v. Baijnath*, (1891) 18 C. 573, *per the*

Calcutta A.C.

⁵ *Per* H. of L. in *Meyerstein v. Barber*, 4 E. I. App. 317, 39 L.J. C.P. 187; *Gilbert v. Guignon*, (1872) 8 Ch. Ap. 16, where the endorsee did not take *bona fide* without notice; see § 243.

⁶ *Glynn v. East and West Docks*, (1882) 7 App. Cas. 591, H of L.; 52 L.J. Q.B. 146.

⁷ This is not necessary in England, S. of G. Act, s. 47.

108, a transfer after the transit is ended, would only pass the ownership and not defeat the right to stop.

It has been said that a transfer after notice to stop defeats the seller's rights,¹ but it seems that the goods are then no longer in transit and under section 106 the transfer is not effective to defeat the right to hold the goods until payment.

Transfer after notice to stop.

It seems that the section includes a case of assignment to a second buyer where the sale is on credit, and the term of credit has not transpired,² as a solvent buyer's promise is consideration. The Bombay Appeal Court held that transferees of a bill of lading who are liable to the transferors for the full amount of the advance, are if they pay the transferors, if not before, transferees for value, even if payment occurs after notice to stop.³

§ 427.
Where transfer made on credit.

Where a bill of lading or other instrument of title to any goods is assigned by the buyer of such goods by way of pledge, to secure an advance made specifically upon it, in good faith, the seller cannot, except on payment or tender to the pledgee of the advance so made stop the goods in transit.

§ 103.
How seller may stop where instrument of title assigned to secure specific advance.

Illustrations.

- (a) A sells and consigns goods to B of the value of Rs. 12,000. B assigns the bill of lading for these goods to C, to secure a specific advance of Rs. 5,000 made to him upon the bill of lading by C. B becomes insolvent, being indebted to C to the amount of Rs. 9,000. A is not entitled to stop the goods except on payment or tender to C of Rs. 5,000.

¹ Carver on 'Carriers' 4th Ed. 640.

² So held in *Cahn v. Pockett*, (1899) 1 Q. B. 643 C. A. with respect to the English Acts; see per Lord Selborne, *Kemp v. Falk*, (1882) 7 App. Cas. p. 577 and

Ex parte Golding, (1880) 13 Ch. D. 628, where it was held that there is then a right to stop the unpaid purchase money; but see § 378.

³ *Bapurji Sorabji v. The Clan Line*, (1910) 84 B. 640.

(b) *A* sells and consigns goods to *B* of the value of Rs. 12,000. *B* assigns the bill of lading for these goods to *C*, to secure the sum of Rs. 5,000 due from him to *C*, upon a general balance of account *B* becomes insolvent. *A* is entitled to stop the goods in transit without payment or tender to *C* of Rs. 5,000.

§ 428.
Effect of a
pledge.

At Common Law where there had been a pledge of a bill of lading, as a rule the property in the goods remained in the buyer, and even if the agreement was that the property should pass, this would only be a special property and the general property would remain with the buyer¹; the seller therefore could stop any surplus proceeds after the pledgee was satisfied; for though the pledgee had a right to possession of the goods, the seller had on attempted stoppage an equitable title to the goods subject to that right.² And this was so although the pledgee had other claims against the buyer.³ The Sale of Goods Act, section 47, only provides that the seller's right to stop can only be exercised subject to the rights of the transferee. The method of stopping at Common Law was as in any other case,³ but the result was called an attempted stoppage which gave rise to equitable rights.

Where bill
of lading
pledged.

The section only deals with a case of stoppage and that can only be done on payment or tender of the advance made. Now at Common Law the seller could not, after a pledge of the bill of lading, stop the goods,⁴ his equitable

¹ *Sewell v. Burdick*, (1884) 10 A. C. 74 in lower Court 10 Q. B. D. 363.

² *Re Westzinthus*, (1883) 5 B. & Ad. 817; *Spalding v. Ruding*, (1848) 6 Beav. 376 on appeal 15 L. J. Ch. 374, approved in *Kemp v. Falk*, (1882) 7 A. C. 578 H. L.; *Coventry v. Gladeston*, (1868) L. R. 6 Eq. 44; *Ex parte Golding*,

(1880) 14 Ch. D. 446, 457.

³ *Kemp v. Falk*, (1882) 7 A. C. 578.

⁴ *Re Westzinthus*, (1883) 5 B. & Ad. 817; it is frequently said he can stop, but the right of possession is with the pledgee, so only an equitable right remains; *Kemp v. Falk*, (1882) 7 A. C. 578, 577, 582.

rights arose out of an attempted stoppage and seem to have depended on notice of his claim to the transferee,¹ who on such notice was bound to make over any surplus after deducting his own claim to the seller.¹

§ 428.
Where documents are pledged.

The section cannot be intended to take away the seller's rights on an attempted stoppage, for the necessity of payment or tender only arises if the seller desires to stop the goods; as the fact of a pledge would not generally be known to the seller the section would be unreasonable if construed to mean that the seller's only right was subject to a condition precedent. It appears then that the section while leaving the seller his Common Law rights on an attempted stoppage, also gives him a new right to convert an attempted into an actual stoppage by payment or tender of the advance.

Scrutton² states the position to be that the seller can stop all the property remaining in the vendee. This is a qualified right because it cannot be exercised so as to affect the interests of such an endorsee without paying him off. The vendor can stop the goods on satisfying the claims of the mortgagee or pledgee, or is entitled to receive the proceeds of the goods after these claims are satisfied by realisation of the goods.

Pledge or mortgage.

The fact that the goods of an unpaid seller are included with goods of other sellers under one bill of lading does not preclude him from exercising the right to stop unless he pays off all advances which have been made on the whole consignment,³ but gives him a right to have the pledgee's securities marshalled.

Bill of lading including other goods.

The section in no way interferes with the seller's Common Law right to insist on a pledgee marshalling his securities, and it has been so held, though the terms of the

§ 429.
Marshalling.

¹ *Spalding v. Ruding*, (1848) 6 Bear, 376.

³ *Bapurji v. The Clan Line*, (1910) 34 B. 640.

² 4th Ed. 168.

- § 429.** section were not referred to.¹ The Common Law rule
Marshalling. was that where the bill of lading had been pledged a seller who had attempted to stop the goods, under circumstances which would have created a valid stoppage but for the fact of such pledge, had an equitable right of having the pledgee's securities against the buyer marshalled, that is, of insisting on any other securities held by him against the buyer being employed to satisfy his claims before resort was had to the goods of the unpaid seller.² The equity of this is clear, for otherwise the unpaid seller's right would be defeated not for the benefit of the pledgee but for the benefit of the defaulting buyer's estate.³ Thus where an advance was made on the whole of a consignment and part was stopped, the pledgees were made to go first against the rest of the consignment.¹ If the pledgee has other goods of the buyer's in his hands as security for his advance, he must proceed against them first,² and all his securities are not to be charged rateably to realise his advance.²
- Reason for Rule.**
- Surety.** If the pledgees can claim a return of their advance from a third party, they must do so before having recourse to the unpaid seller's goods.⁴ But where the shippers on notice to stop refused delivery of the goods, the sellers
- Guarantee.** were not allowed to claim that a guarantee against any deficit on the sale of such goods should be marshalled, for they had prevented the goods being sold.⁵

¹ *Bapurji v. The Clan Line*, (1909) 11 Bom. L. R. 1250, where the contract was an English one, and the English law should have been applied; the Appeal Court noticed this, but proceeded to discuss the Contract Act, (1910) 34 B. 640.

² *In re Westzinthus*. (1833) 3 L. J. K. B. 56, approved in *Kemp v. Falk*, (1882) 7 A. C. 573.

³ For the principle see *Broad-*

bent v. Barlow, 3 DeG. F. & J. 570 (a case of fraud); *Ex parte Alston*, (1868) 4 Ch. A. P. 168 (agents pledging); and in equity, *Ex parte Salting* (1883) 25 Ch. D. 148, and notes to *Aldrick v. Cooper* (1802) White & Tudor's L. C. on Eq. 7th Ed. Vol. I. 36.

⁴ *Bapurji v. Clan Line*, 11 Bom. L. R. p. 1262.

⁵ *Ibid.* (1910) 34 B. 640.

*Spalding v. Ruding*¹ confirms *re Westzinthus* and shows that the goods cannot be retained as security for a general balance of account but only of the specific advance.

The right can be claimed by the carriers when sued by a pledgee.²

The mere transfer of a bill of lading does not end the right unless it is for value : there must be some bargain to give an interest in the goods.³ It has been said that if there is a pledge of the bill of lading to secure acceptances, the dishonour of such acceptances puts an end to the pledge.³ If the endorsement is made to factors to whom the consignee owed money, not as pledgees but qua factors or banians,⁴ the right is not defeated.⁵

§ 430.
For value.

In India it would seem that a transfer of a bill of lading for the release of antecedent claims or for forbearance is not a transfer for value ; this was so held in the Privy Council.⁶ The English Court of Appeal, however, dissented from this decision,⁷ but illustration (1) to section 103 seems to point to the view taken in the Privy Council. The Calcutta High Court⁴ decided that the Legislature had followed the Privy Council ruling, but added that it is sufficient if a sum is advanced in terms that it is to be secured by the particular bill of lading in question or the goods represented by it, though it may be secured by other bills or goods also, and though the bills of lading may have been intended to be security not only for the

Pledge for
previous
debt.

¹ 6 Beav. 376.

² *Bapurji v. Clan Line* (1910) 34 B. 640.

³ *Per* Abbott, J., in *Patten v. Thompson* (1816) 5 M. & S. 350 ; see *Lilladhar v. Wreford*, 17 B. 78.

⁴ *Peacock v. Byjnauth*, 18 I. A. 78, 18 C. 577 S. C. 11 C. 740 ; the Privy Council did not consider the point.

⁵ *Patten v. Thompson*, (1816) 5

M. & S. 350.

⁶ *Rodger v. The Comptoir d'Escompte*, (1869) L.R. 2 P.C. 393.

⁷ *Leask v. Scott*, (1877) 2 Q. B. D. 376 C. A. ; *Kallenbach v. Lewis*, (1885) 10 App. Cas. 617 ; see too *Chartered Bank of India v. Henderson*, (1874) L. R. 5 C. P. 501, where the P. C. distinguished *Rodger v. The Comptoir d'Escompte*.

§ 430.

Pledge for
previous
debt.

particular sum advanced on it, but also for some antecedent liability. The Court stated the words "made specifically upon it" are not free from doubt;¹ but however that may be, it seems that they cannot include sums advanced antecedent to the pledge as against the unpaid seller; the pledge as against him would only be to the extent of the specific advance.

Even in England it must be shown that it was agreed that such debt should be the consideration for the pledge. A pledge specifically for a definite sum does not entitle the pledge to hold the goods against the seller in respect of a general balance of account against the buyer, even though the pledgee be the buyer's factor.²

Del credere
agents.

Agents who sell the goods for the buyer taking a *del credere* commission to secure that the sub-buyers would pay, are not entitled to have the bill of lading endorsed to them as security.³

Banks.

A bank by acknowledging itself a debtor to a constituent for the amount of a negotiable instrument becomes a holder for value even if the account is not overdrawn,⁴ and would, it seems, be an assignee for value of a bill of lading against which the instrument was drawn, if it were transferred as security for it.

Section 104.
Stoppage
how
effected.

The seller may effect stoppage in transit, either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other depository in whose possession they are.

Section 105.
Notice of
seller's
claim.

Such notice may be given, either to the person who has the immediate possession of the goods, or to the principal whose servant has possession. In the latter case, the notice must be given at such a time, and under such circumstances, that the principal, by the exercise of

¹ This doubt was one of the grounds for allowing an appeal to the Privy Council.

² *Spalding v. Ruding*, (1849) 12 L. J. Ch. 508, 8 Reav. 376.

³ *Kemp v. Falk*, (1882) 7 App. Ca. p. 583.

⁴ *Mowji v. National Bank of India*, (1900) 25 B. 499.

reasonable diligence, may communicate it to his servant in time to prevent a delivery to the buyer.

Section 105 is the same as the English Act, section 46 (1) and the Common Law.¹

At Common Law no particular form was necessary, and Lord Harwicke said that the seller was so much favoured in exercising it as to be justified in getting his goods back by any means not criminal before they reached the possession of the insolvent buyer.² All that is required is some act or declaration of the seller countermanding delivery.

The usual method is a simple notice to the carrier stating the seller's claim and forbidding delivery to the buyer or requiring that the goods shall be held subject to the seller's orders. Demand for the goods made by the seller's agent on the master of the ship is sufficient,³ and so is an entry of the goods in the Custom House by the seller on the arrival of the vessel, in order to pay duties.⁴ So when wines were delivered from the ship and put in the King's cellars according to the excise law and were claimed by the seller's agent while there, it was held a good stoppage.⁵ As the Code is couched in permissive terms, the two methods of stoppage are probably not exhaustive.

There are certain circumstances in which it seems notice to consignee to stop might be effective, as when the goods, though delivered into his warehouse, have been so delivered without his consent, and he knowing of his impending insolvency, refuses to accept them.⁶ The point was raised in *Ex parte Cooper*⁷; the facts were curious.

§ 431.
How the
right is
exercised.

Notice to
customs.

§ 432.
Notice to
consignee.

¹ *Bethell v. Clark*, (1887) 19 Q.B.D. p. 560; *Whitehead v. Anderson*, (1842) 9 M. & W 518, 538.

² *Snee v. Prescott*, (1743) 1 Atk. 260; see *Litt v. Cowley*, (1816) 2 Marsh. 457.

³ *Bohtlingk v. Inglis*, (1803) 3 East. 381.

⁴ *Ex parte Walker*, (1755), cited in Cooke's 'Bankrupt Law', 402.

⁵ *Northey v. Field*. (1793) 2 Esp. 613; *Nit v. Olive*, (1805) Abbott on 'Shipping,' 14th Ed. 83:1.

⁶ See § 413, *Heinekey v. Earle*, 28 L. J. Q.B. 79, 8 E. & B. 410.

⁷ (1879) 11 Ch. D. 68.

§ 432.
Notice to
Consignee.

McLaren carried on business in London alone as McLaren & Co. ; he was also the managing partner of a Scotch firm. The Scotch firm sold goods to the London firm and shipped them ; after part had been delivered, McLaren finding both firms were insolvent, wired to his manager in London to stop delivery. Both firms became bankrupt and the trustees of both claimed the goods. It was argued that notice to the manager was not a valid notice to stop and that it was rather a case of an insolvent purchaser refusing to receive goods which he knew he could not pay for.¹ James, L. J., considered that it was a case of stoppage ; and that the fact that one partner in the one firm was the other firm made no difference. Brett, L. J., also held that there was a valid stoppage ; and added " I think this case goes further than a mere stoppage in transit, because to my mind the agreement of the vendor and vendee intended a cessation of the delivery of the goods." Cotton, L. J., did not commit himself to either view, *i.e.*, whether it was a case of stoppage or of refusal by the vendee to accept delivery.

While the authorities were in this state, namely, that while the transit was not ended by delivery with his consent the consignee could refuse to accept the goods and that an agreement between the consignor and consignee not to accept the goods was valid, and that a notice to stop given to the consignee apparently was effective at any rate if acted upon by him, the question was discussed in *Phelps v. Comber*.² There the consignor wired to the insolvent consignee to hold the proceeds against accepted bills. Cotton, L. J., held that this showed no intention on the part of the sellers to retake possession and refused to express any opinion as to whether an ordinary notice to stop could ever be effective if sent to the consignee. Lindley, L. J., expressed no opinion on the point, but

¹ For the position of a buyer in such a case, see § 418.

² (1885) 29 Ch. D. 813.

seems rather to favour the view that such a notice is valid. **Notice to Consignee.**
 Fry, L. J., said he was not convinced that a notice to the consignee could be valid.

In America it was held that a notice to the buyer was insufficient in *Moltram v. Heyer*, a New York case.¹ The contrary was held in the State of Pennsylvania,² on the ground that any notorious act of reclamation sufficed as in *Ex parte Walker* set out in para. 431. **In America.**

In India it was held that notice to the insolvent consignees of an intention to stop is not of any effect, even if in any circumstances notice to the consignees can be an effectual stoppage.³ **In India,**

Notice of stoppage to the official consignee is in itself valueless, as being it seems in the shoes of the consignee.⁴ **Official Assignee.**

Notice to the ship's agents while the goods are still on board is equivalent to notice to the ship's master, as it is the duty of the agents at once to communicate with him,⁵ but the notice, it seems, must reach the master in time.⁶ **§ 433. Notice to ship's agents.**

A notice to the shipper's agents to stop bales in a particular ship and any other bales shipped on account of D. & Co. to B. A. & Co., is effective to stop goods in another boat, though it is indefinite.⁷ **Indefinite notice.**

Notice of stoppage to dock authorities after the goods are landed was held to be ineffectual, the shippers having given a delivery order to the consignees.⁸ But *quære* : ⁸ apparently the Court considered the dock trustees agents **To dock authorities.**

¹ (1846) 5 Denio. 629.

² *Bell v. Moss*, (1840) 5 Whart. (Penn.) 189 (notice to consignee's assignees).

³ *Lilladhar v. Wreford*, (1897) 17 B. p. 87, relying on *Phelps v. Comber*, (1895) 29 Ch. D. 813.

⁴ *Ibid.* p. 88.

⁵ *Ibid.* p. 89, citing *Kemp v.*

Falk, 7 Ap. Ca. p. 585.

⁶ See however § 435.

⁷ *Ibid.* p. 90.

⁸ See *Northey v. Field*, (1798) 2 Esp. 613 (goods in bond) ; as to sufferance wharves in England see Benj. 5th p. 848 ; *Meyerstein v. Barber*, (1870) L. R. 4 H. L. 317, 39 L. J. C. P. 187.

§ 433.
Notice to
stop.

for neither party, and under section 100 it would seem the transit had not ended : the trustees clearly held the goods lodged in the cause of transmission to the buyer. The *ratio decidendi* was that they were bound to deliver to the person presenting the bill of lading ; but so is any carrier or bailee, apart from this right.

Agreements
as to goods
with official
assignee.

Agreements as to dealing with goods in transit between the unpaid sellers and the buyer's trustee in bankruptcy do not amount to stoppage in transit.¹

Demand
for bill of
lading.

A demand by the seller for the bills of lading from the ship owner who had retained them as security for freight was held sufficient.²

§ 434.
Must be
by act
showing
intention
to resume
possession.

The stoppage to be effectual must be on behalf of the seller in the assertion of his rights as paramount to those of the buyer³ and must be done by an act showing an intention to resume possession, though the act may in fact be done with the buyer's consent ;⁴ a direction to the consignees to hold the proceeds to the seller's order, even if a notice to the consignee is sufficient, is not a valid exercise of the right as it implies that the goods will be delivered to the buyer, and is only a direction as to what is to be done after they have sold them.⁵

§ 435.
Notice
must reach
the bailee.

To be effective the notice in England must, it seems, reach the person who has immediate custody of the goods, before the buyer obtains possession.⁶ Where notice was given to the shipowner and he endeavoured to stop the goods, but as Blackburn puts it, the assignees of the bankrupt won the race, it was argued that notice

¹ *Lilladhar v. Wreford*, (1882) 17 B. p. 85, citing *Siffken v. Wray*, (1805) 6 East. 371.

² *Ibid.* citing *Ex parte Watson*, (1877) 5 Ch. D. 35.

³ *Siffken v. Wray*, (1805) 6 East. 371 ; *Lilladhar v. Wreford*, (1892) 17 B. 85.

⁴ *Lilladhar v. Wreford*, (1892)

B. 17 B. 62 ; *Phelps v. Comber*, (1885) 29 Ch. D. 813 ; *Mills v. Ball*, (1801) 2 B. & P. 457 ; *Re O'Sullivan*, 61 L. J. Q. B. 228 in C. A. 67 L. T. 464.

⁵ *Lilladhar v. Wreford*, *supra*.

⁶ *Whitehead v. Anderson*, (1842) 4 M. & W. 518 ; *Bethell v. Clark*, (1887) 19 Q. B. D. p. 560.

to the principal was sufficient, relying on *Litt v. Cowley* ;¹ but it was held as stated above.² § 435.

But the terms of the section seem to imply that as long as the principal has time to communicate, the stoppage is effective.³

The Common Law rule was that the principal on receiving notice was bound to forward it with due diligence, but that if there was not sufficient time to communicate with the carrier before delivery, the principal was free from responsibility and the right to stop was lost.⁴

There seems to be no authority as to the effect of notice to a principal in ample time to communicate with the bailee in possession, which is not duly forwarded.⁵ It seems the principal would be liable, but the code leaves the effect as to stoppage in doubt, though the wording certainly points to the result that the stoppage is good.

According to Scrutton⁶ if the notice does not reach the carrier, the view in England is even if this was by the negligence or mistake of the principal, the seller's right is gone save as against the carrier ; *Litt v. Cowley*⁷ which decided the contrary is against later authorities as it proceeded on the view that the contract was thereby rescinded.⁸

As soon as notice is given to the carrier in custody of the goods the seller has the right to hold the goods until he is paid,⁹ and there is no need for the carrier to § 436. Effect of giving notice.

¹ 7 Taunt. 169.

² *Whitehead v. Anderson*, (1842)

4 M. & W. 518 ; *Bell v. Clark*, (1887) 19 Q.B.D. p. 560.

³ See *Lilladhar v. Wrexford*, (1892) 17 B. 62, 89.

⁴ *Kemp v. Falk*, 7 A. C. p. 585, but see *ibid.* per Bramwell, L. J. ; *Lilladhar v. Wrexford*, 17 B. 12, 89.

⁵ But see *Litt v. Cowley*, (1816) 7 Taunt. 169.

⁶ Scrutton on Bills of Lading, 6th Ed. 177.

⁷ 1816, 7 Taunt. 169.

⁸ *Litt v. Cowley*, (1816) 2 Marsh 457, 17 R. R. 482 (not the property as there stated) ; *Kemp v. Falk*, (1882) 7 Ap. Ca. p. 581 ; *Lilladhar v. Wrexford*, (1892) 17 B. p. 89 ; *Phelps v. Comber*, (1885) 29 Ch. D. p. 811.

§ 436.
Effect of
notice.

assent to the stoppage,¹ even if the goods are afterwards delivered to the buyer by the mistake of the carrier,² the seller's rights subsist, and the seller can follow the goods into the hands of the buyer's sub-agents,³ or assignees in bankruptcy.⁴ The carrier cannot by wrongful refusal to deliver to the seller prejudice his rights.⁵ On principle it seems that the carrier's authority to deliver is cancelled by such notice, and no act of his can subsequently affect the seller.

No need
to take
possession.

Blackburn⁶ says it was formerly thought that in order to make a stoppage good, there must be an actual taking of possession by the seller or his agent, but now it is clear that the seller's rights are complete on giving the person in possession of the goods notice of his claim to stop at a time when it can be obeyed.⁷

Actual
possession
taken, not
necessarily
stoppage.

Even if actual possession is taken by the seller's agent, that is not a stoppage unless done with that intent.⁸

Payment of
freight.
Remedies of
the seller if
the carrier
refuses to
comply with
notice.

There is no need to tender the freight to the carrier, but the carrier can retain the goods until this is done.

If the carrier after notice refuses to redeliver to the seller, or delivers to the buyer, he is guilty of conversion.⁹ The seller also possesses a remedy by injunction,¹⁰ or by arrest of the ship if the goods are in the possession of a

¹ *Pontifex v. M. Ry.*, (1877) 3 Q. B. D. 23, 28, overruling *Mills v. Bull*, (1801) 2 B. & P. 457.

² *Litt v. Cowley*, (1816) 2 Marsh 457, 17 R. R. 482 (not the property as there stated); *Kemp v. Falk*, (1882) 7 Ap. Ca. p. 581; *Lilladhar v. Wreford*, (1822) 17 B. p. 89; *Phelps v. Comber*, (1885) 29 Ch. D. p. 821.

³ *Peacock v. Baynath*, (1811) 18 O. p. 577 citing, *Maspons v. Mildred*, (1882) 8 Ap. Ca. 874.

⁴ *Litt v. Cowley*, *supra*; *Bohtlingk v. Inglis*, (1803) 8 East. 331; see *Schotsmans v. L. & Y. Ry.*, L.

R. 1 Eq. 349.

⁵ *Lilladhar v. Wreford*, 17 B. p. 89; *Bird v. Brown*, 4 Ex. 786.

⁶ Blackburn, 3rd Ed. p. 414.

⁷ S. of G. Act, s. 46; Blackburn, 3rd Ed. 414.

⁸ *Sijfken v. Wray*, 6. East. 371.

⁹ *Pontifex v. M. R. Co.*, (1877) 3 Q. B. D. p. 28, *Ormonde v. Bailey*, (1895) 11 T. L. R. 219, S. of G. Act, s. 57; *Taylor v. G. E. Ry.*, (1901) 1 K. B. 774.

¹⁰ *Schotsmans v. Lancashire Ry. Co.*, (1867) 2 Ch. p. 340.

carrier by water.¹ Such refusal does not make the stoppage ineffective.² § 436.

Carriers cannot by wrongful detainer of goods or by delivering them over to other parties than the assignees of the consignees prolong the transit and extend the period during which stoppage might be made.³ Nor does the right survive if the carrier having attorned to the buyer, retains the goods in the exercise of his lien.⁴ Carrier cannot prolong the transit.

If the bailee has notice of conflicting claim; he delivers at his peril, and his only mode of protecting himself is to take an indemnity, or if that is refused to interplead.⁵ If the master has no notice of any fact making it wrong for him so to deliver the goods, he may deliver to the person who first presents a bill of lading;⁶ and so may a dock company to whom the master has delivered goods even if the bill is marked "second."⁷ This case only holds that the master or other bailee is not liable in such a case, and in no way conflicts with the rule that the first copy of a set of bills of lading indorsed with the intent to pass the property, passes the property, and that no other copy subsequently endorsed can affect this title. Position of carrier on notice.

In the case of *The Tigress*⁹ it was held : (1) That a seller's notice to stop makes it the duty of the master of the vessel to refuse delivery to the buyer to whom a bill of lading has been endorsed. (2) That all that is necessary to a notice of

¹ *The Tigress*, (1863), 32 L. J. Adm. 97.

² See § 437.

³ *G. I. P. v. Hanmandas*, 14 B. 57.

⁴ *Allan v Gripper*, (1832), 1 L.J. Ex. 71, *Kemp v. Falk*, (1882) 7 A. C. p. 584.

⁵ *Bapurji v. Clan Line*, (1909) 11 Bom. L. R. 1250, (1910) 34 B. 640 C.A., *The Tigress*, (1863) 32 L. J. Adm. 97; see *Wilson v. Anderton*, (1930) 1 B. & Ad. 450;

Batut v. Hartley, (1872) 7 Q. B. 594.

⁶ *Meyerstein v Barber*, (1866) L. R. 2 C. P. p. 55, L. R. 4 H. C. 611, 614, 616.

⁷ *Glyn v. East and West India Docks Co.*, (1852) 7 Ap. Ca. 591.

⁸ *Sanders v. MacLean*, (1883) 11 Q. B. p. 335, 341.

⁹ *The Tigress* (1863) 32 L. J. Adm. 97, followed in *Bapurji v. Clan Line*, (1909) 11 Bom. L. R. 1250, (1910), 34 B. 640 C. A.

§ 436. stoppage is "for the vendor to assert his claim as vendor and owner" and he need not prove all the conditions necessary to stoppage have been fulfilled; consequently a notice is sufficient without any representatives that the bill of lading has not been transferred by the buyer, for that is not a matter ordinarily within the seller's cognisance. (3) That the stoppage is at the seller's peril¹ and it is incumbent on the master to give effect to a claim as soon as he is satisfied that it is made by the seller, unless he is aware of a legal defeasance of the seller's claim.

§ 437.
Duty of
bailee on
receipt of
notice.

The English Act provides that when notice of stoppage in transit is given by the seller to the carrier, or other bailee, in possession of the goods, he must deliver the goods to or according to the directions of the seller. This reproduces the Common Law,² and will therefore apply in India in the absence of any provision on the point; and it has been so held.³ The expenses of such redelivery must be borne by the seller.⁴

A party who has made advances on a bill of lading can sue shippers who have refused delivery on receipt of an invalid notice to stop.⁵

Section 106.
Right of
seller on
stoppage.

Stoppage in transit entitles the seller to hold the goods stopped until the price of the whole of the goods is paid.

Illustration.

A sells to B 100 bales of cotton; 60 bales having come into B's possession and 40 still being in transit, B becomes insolvent and A, being still unpaid, stops

¹ See Blackburn, 266, 1st Ed. 381.

² *Kemp v. Falk*, (1882) 7 A. C. p. 585; *Whitehead v. Anderson*, (1842) 9 M. & W. 518; *The Tigris*, (1868) 82 L. J. Adm. 17.

³ *Bapurji v. Clan Line*, (1909) 11 Bom. L. R. 125; (1910) 34 B. 640 C. A.; *Lilladhar v. Wrexford*, (1892), 17 B. 62.

⁴ S. of G. Act 463. See *Somes v. British Empire Shipping Co.*, (1858) 8 H. L. C. 338, Chalmers's 7th Ed. 112 suggests that the seller can recover them from the buyer's estate.

⁵ *Bapurji v. Clan Line*, (1909) 11 Bom. L. R. 1250, (1910) 34 B. 640 C. A. citing *Cahn v. Pocketts*, (1899), 1 Q. B. 643.

the 40 bales in transit. A is entitled to hold the 40 bales until the price of the 100 bales is paid.

The effect of stopping in transit is not to rescind the contract but to revest the seller's lien for the price.¹ The right of resale given by the next section,¹ shows this.

**§ 438.
Effect of
stopping.**

The seller can thereafter and after the expiration of the credit, maintain an action for goods bargained and sold.²

Whether the effect of stoppage is to dissolve the contract has been much discussed in England,³ the general consensus of opinion was that it did not.⁴ Sections 44 and 48 (1) of the Sale of Goods Act provide that it does not.

Stopping part of the goods under an entire contract has no effect on the remainder.⁵

¹ Contract Act s. 107 ; *cf.* S. of G. Act s. 48 (1).

² Smith M. L. 11th Ed. 752.

² *Kymer v. Sowercrops*, (1807), 1 Camp. 109 (a case of lien, but the same rule applies : *Benj.*, 5th Ed. 926).

⁴ *Phelps v. Comber*, (1885) 29 Ch. D. p. 821 54 L. J. Ch. 1017.

⁵ *Wentworth v. Outhwaite*, (1842) 10 M. & W. 436.

Resale.**§ 439.
Resale.**

The subject of resale is a difficult one ; it will be considered, first, in cases where the property has passed, and, secondly, in cases in which it has not.

**Reason for
the right.**

The reason for giving the right is that where the property has passed and the buyer is not in such default as to amount to a repudiation of the contract, the seller's right, if he had no power to resell, would only be to wait until the delay amounted to repudiation, and charge the buyer with the reasonable expenses of keeping the goods in the meantime.

**§ 440.
Advantage
of the right.**

The advantage of the right is that the damages are fixed by the resale if properly and fairly made, however small a price is realised,¹ and the seller is not driven to prove the difference between the market and contract rate on the due date. This may be a great advantage if the market is rapidly falling ; for, although the resale must then be with all reasonable expedition, the fall in price between the due date and date of resale is on the buyer and not on the seller.

**§ 441.
Law applic-
able.**

Whether the property has passed or not, questions as to resale must, according to Garth, C. J., be determined, as far as possible, by reference to the Contract Act, and not to the English Law.² The English Law is different under the Sale of Goods Act,³ and the Common Law which will be considered further in connection with cases where the property has not passed, was, it seems, not free from doubt, though the learned editors of the 5th Edition of Benjamin⁴ contend that section 107 was meant to and did represent the Common Law.

¹ *Buchanan v. Awdall*, (1876) 15 B. L. R. 276.

² *Buldeo Das v. Howe*, (1880) 6 C. 64 C. A.

³ Section 48, and Benjamin, 5th

Ed. p. 951-4. Pollock considers the Indian s. 107 and the S. of G. Act amount to the same.

⁴ Page 938.

Resale.

Where the buyer of goods fails to perform his part of the contract either by not taking the goods sold to him or by not paying for them, the seller, having a lien on the goods or having stopped them in transit may, after giving notice to the buyer of his intention to do so, resell them after the lapse of a reasonable time, and the buyer must bear any loss but is not entitled to any profit which may occur on such resale.

Section 107.
Resale on
buyer's
failure to
perform.

The section is not exhaustive and it seems that it does not affect any Common Law powers of resale.

The right to resell under the section only arises when the property in the goods has passed to the buyer.¹ The section does not provide the seller's sole remedy, but if he elects to proceed and sue under it, a strict compliance with its requirements is essential.²

§ 442.
Only where
the prop-
erty has
passed.

In the first place the buyer must be in default; this does not mean in such default as would enable the seller to avoid the contract for repudiation (in which case he can resell after repudiation as owner), but any delay unauthorised by the contract is sufficient. The object of the right is to give a seller a remedy where the delay is not enough to justify avoidance for repudiation of the contract by the buyer, as the seller would otherwise be unprotected. If the terms of the section are properly complied with, the question of the extent of the default does not arise.

§ 443.
Buyer must
be in de-
fault.

It seems quite clear that if, after notice of resale, the buyer, before the resale, tenders the price, the seller would not be justified in reselling, and if he did so, it would be a tortious resale.³ For it seems that the seller

§ 444.
Effect of
tender.

¹ *Clive Jute Mills v. Ebrahim Arab*, (1896) 24 C. 177; *Yule v. Mahomed Hossain*, (1896) 24 C. 124, 1 C. W. N. 71; *Haridas v. Kalumull*, (1903) 30 C. 649.

² *Buchanan v. Avdall*, (1875) 15 B. L. R. 276.

³ *Martindale v. Smith*, (1841) 1 Q. B. 389, but see *Simson v. Gora Chand*, (1883) 9 C. 473, where the report is hopelessly defective: it does not appear if the suit was for damages or under s. 107.

§ 444.
Effect of
Tender.

by giving notice of resale under the section, no matter what the default of the buyer has been, elects to keep the contract open, and therefore the buyer may still perform his part of it. It has been held in Calcutta that a buyer, who has refused to accept, may, at any time even after a suit is brought for non-acceptance, so long as he does so before the verdict, offer to take the goods and pay all costs occasioned by his breach of contract, and thereby reduce the damages, which Pontifex, J., suggested would then be one farthing, provided the goods had not been properly resold.¹ This seems an extreme view, and conflicts with the principle that anything occurring after the writ is delivered is irrelevant.² But the rule, it seems, is clear at least to the extent that the buyer may offer to perform up to the actual resale and thereby render any resale tortious.³ All the cases in which it is said the tender must be within the time allowed by the contract expressly or impliedly, are cases of resales not under statutory rights, but as owner, where the seller has the right to avoid the contract and may do so in spite of a tender if made out of time where time is of the essence of the contract.⁴

§ 445.
Must give
reasonable
notice.

The seller must give reasonable notice of his intention to resell, and if the resale is hurried on in an unusual manner without proper advertisement, it will be held invalid.⁵ What is reasonable notice is a question of fact⁶ depending on the circumstances and the nature of the goods and the state of the market.

¹ *Buchanan v. Avdall*, (1875) 15 B. L. R. pp. 292, 293.

² *Clayton v. LeRoy*, (1911) 2 K. B. 1031 C. A., 105 L. T. R. 430.

³ See *Walter v. Smith*, (1822) 5 B. & Ald. 439, (a pawnbroker selling) and see *Blackburn*, 3rd Ed. p. 492.

⁴ *Wilmshurst v. Bowker*, (1848)

12 L. J. Ex. 475; *Mirabila v. Imperial Ottoman Bank*, (1878)

8 Ex. D. 164 C. A.; *Cohen v. Foster*, (1892) 61 L. J. Q. B. 643.

⁵ *Buchanan v. Avdall*, (1875) 15 B. L. R. 276.

⁶ See *Milgate v. Kebble*, (1841) 10 L. J. C. P. 277, 8 M. & G. 100 (two days' notice).

The reasonableness of any period specified in the notice will also depend on whether there was any undue delay or not previous thereto.¹ § 445.

At Common Law it is doubtful whether notice was essential.²

There is no rule laid down in the Code as to what amounts to notice. According to Addison³ a mere notice to remove the goods and pay the price will not justify the vendor in re-selling, and this was the dictum in *Greaves v. Ashlin*,⁴ where, however, there had been express notice. Lord Ellenborough, however, treated it as a case of notice given to fetch away the goods, which he held could not discharge the seller from his contract. The buyer sued for non-delivery and obtained judgment for the profit on the resale. It seems there must be a distinct intimation of an intention to resell if the goods are not removed and paid for in a reasonable time.⁵ Form of notice.

If the buyer repudiates the contract, the seller, if he proceeds under the section, must give notice of resale, but he can rescind under section 55 or 39 and resell as owner, but then he must prove damages in the ordinary way.⁵ Where buyer repudiates the contract.

Notice is of importance for two reasons: one, that the buyer may have some chance of seeing that the goods are not undersold ; and the other, that he may have an opportunity to fulfil his contract. For tender of the price at any time before resale, bars the seller's right.⁶ Importance of notice.

¹ *Compton v. Bagley*, (1892) 1 Ch. 320, 321.

² *Maclean v. Dunn*, (1828) 6 L. J. (O.S.) C. P. 184; Benj. 5th Ed. p. 950.

³ Addison on Contracts, 10th Ed. 580.

⁴ (1813) 3 Camp. 425.

⁵ See *Braithwaite v. Foreign Hardwood Co.*, (1905) 2 K. B. 543, where the buyers repudiated the contract and there seems to have been no notice of resale, and it is

difficult to see why the resale rate was adopted as a measure of damages—*quære* can a party by conduct waive the fulfilment of statutory conditions precedent to statutory rights. A statutory right can be waived *G. E. R. v. Goldsmith* 9 A. C. p. 986; *Kashiram v. Pandu*, (1902) 4 Bom. L. R. 696.

⁶ *Martindale v. Smith*, (1841) 1 Q.B. 389, 55 R. R. 285.

§ 446.
Must sell
within a
reasonable
time.
 Time for
 re-sale.

The seller electing to exercise this right is not only bound to wait a reasonable time after giving notice of his intention before actually reselling, but he is bound to exercise the right within a reasonable time after the date of the breach, otherwise the price obtained on such resale, if it has been unreasonably delayed until the market has fallen,¹ will not be a true criterion of the damage.² Where after refusal to accept, the goods were damaged by fire, the District Court dismissed the seller's suit on the ground that he had had ample time to resell before the fire. On appeal the High Court failed to notice the point.³ But, assuming there was a market for the goods, it seems that the District Court took the sounder view, for a seller may not indefinitely saddle the buyer with the risk of wrongfully rejected goods,³ but must act reasonably so as to mitigate the loss:⁴ and all the circumstances must be considered to ascertain if the seller has acted as a reasonable man of business should have done; if he has not he is not entitled to the benefit of the section.⁵ The theory of a resale is that it affords a true criterion of the damage,⁶ and a fair resale even where the seller had no right of resale under the Code has been adopted as the basis for assessing damages.⁷

§ 447.
Must resell
fairly.

A resale must be properly and fairly conducted, and if there has been any underhand dealing the resale will be invalid.⁸ So where the seller himself bought at an auction sale unduly hurried on and insufficiently

¹ See Addison, 11th Ed. 584; citing *Stewart v. Cauty*, (1841) 10 L. J. Ex. 348, 8 M. & W. 160; but this case is no longer law on this point; see § 652.

² *Prag Narain v. Mul Chand*, (1897) 19 A. 535; *Pott v. Flather*, (1847) 16 L. J. Q. B. 366 C. A.

³ *Shoshi Mohun Pal v. Nobo Kristo*, (1878) 4 C. 801.

⁴ Contract Act s. 73, illus. (a),

(c) (see *Lachmi Narain v. Vernon*, (1906) Punj. Rec. No. 137.

⁵ See *Mackertich v. Nobo Coomar*, (1903) 30 C. 477, as to a buyer's duty.

⁶ Bullen & Leake, 6th Ed. 275; Maine on 'Damages,' 6th Ed. 211.

⁷ *Ruttonsey Morarji v. Jamnadas*, (1882) 6 B. 692.

⁸ *Buchanan v. Avdall*, (1875)-15 B. L. R. 276.

advertised, the quality of the goods being under a cloud as regards other possible buyers, it was held he could recover nothing as damages without accounting for the goods.¹ The seller may, however, be the purchaser at a properly conducted resale by auction if he acts fairly and openly.²

§ 447.

It has been held in America that it is common and generally advisable to resell by auction, but this is not essential.³

By auction.

The only seller who can resell is an unpaid seller in possession, for if delivery has been given it is only under a special agreement in that behalf that the seller can reclaim the goods for non-payment.⁴

§ 448.
Who may resell.

As the right is given to a seller having a lien, part-payment does not affect his right. Nor does part-delivery, unless in progress of the whole so as to end a transit or divest a lien.

Part-payment
Part-delivery.

It has been held that a seller who has agreed to be the buyer's bailee cannot resell,⁵ but that depends on whether he has a lien.⁶

Where seller
is buyer's
bailee.

If the price has been paid the position is not covered by the section; the seller can request the buyer to take delivery, and, on his failure to do so, charge him with all loss occasioned thereby and the reasonable expenses of the care and custody of the goods,⁷ or if the buyer's refusal or neglect to take delivery amounts to a repudiation of the contract, he can avoid it.⁸ But otherwise he cannot resell, for that would be conversion of the goods.

Where seller
is paid.

¹ *Buchanan v. Avdall*, (1875) 15 B. L. R. 276.

⁶ See § 849.

² See *Yule v. Mohamed Hossain*, (1896) 24 C. 124; cf. *Murphy v. O'Shea*, 2 L. & J. 422 (an agent buying his principal's land).

⁷ *Greaves v. Ashlin*, (1813) 8 Camp. 426.

³ *Crooks v. Moore*, (1848) 1 Sandf. 297; *Conway v. Bush*, 4 Barb. 564.

⁸ This is frequently called rescinding the contract, but, as Benjamin 5th Ed 935 points out, a contract can only be rescinded by a Court of Equity or by the mutual agreement of the parties, whether in exercise of a power contained in the contract or by subsequent assent.

⁴ Contract Act s. 121.

⁵ *Peeran v. Shroff Sabba*, 15 M. C. C. R. 254.

§ 449.
Rights of
parties
after
resale.
Recovery of
part-pay-
ment.

After a resale within the section, it is provided that the seller is entitled to any profit and may sue for any loss.

It seems that if the resale is at a loss exceeding any part-payment, such part-payment cannot be recovered.¹ Whether the seller can appropriate any part-payment towards the costs of resale is undecided in England.² It seems that under section 64 the seller must restore any benefit, but semble that means net benefit, and part-payment can be appropriated to the costs of resale.

Resale at a
profit.

If the resale is at a profit in England the question as to whether the buyer can recover any part-payment is undecided.³ Whether the rule that a party who rescinds must restore any benefit received applies⁴ or whether the buyer is debarred from recovering because he cannot show readiness and willingness to perform his contract is not decided.⁵ In India probably the principle of section 64 would apply and any net benefit must be restored,⁶ but as a resale does not rescind the contract the point is not clear.

§ 450.
Deposit.

Apparently after a legitimate resale a buyer cannot recover any deposit, for a deposit is a guarantee that the buyer will perform his contract, and is forfeited on his failure to do so.⁷ This would come under the general principle that where a contract of sale goes off by default

¹ *Fitt v. Cassanet*, (1842) 12 L. J. C. P. 70; *Howe v. Smith*, (1884) 27 Ch. D. 89.

² Benj. 5th Ed. 955.

³ *Cornwall v. Henson*, (1900) 2 Ch. pp. 302, 305.

⁴ See *Clough v. L & N. W. Ry.*, (1871) L.R. 7 Ex. p. 37; *Hunt v. Silk*, (1804) 5 East. 449.

⁵ See *Fitt v. Cassanet*, (1842) 4 M. & G. p. 904; *Cornwall v. Henson*, (1899) 2 Ch. p. 715; Benj. 5th Ed. addenda CXLIII

cites *Nels v. O'Brien* (1895) 50 Amer. St. R. 894, where it was held he could not.

⁶ Benj. 5th Ed. 955 takes this view.

⁷ *Palmer v. Temple*, (1839) 9 A. & E. 508; *Howe v. Smith*, (1884) 27 Ch. D. 89 C.A.; *Cornwall v. Henson*, (1899) 2 Ch. 710 p. 715 in C. A. (1900) 2 Ch. p. 302; *Sprague v. Booth*, (1909) A.C. 576 P.C.; see *Madan Moken Singh v. Gaja Prasad*, (1911) 14 C.L.J. p. 167.

of the purchaser, he cannot recover any deposit.¹ It has been held in Madras that the question of the forfeiture of a deposit on the default of the seller depends on its reasonableness and does not come within section 74 of the Contract Act, nor within the principles of law laid down in decisions dealing with promises to pay specific sums in cases of breach of contract, although the deposit be to secure the performance of stipulations, some of which are but trifling and others not such.² Not a penalty.

The effect of a resale under the section is not to rescind³ the contract entirely, for the buyer must bear any loss, but is not entitled to any profit on such resale. This was so at Common Law.⁴ Apparently the seller sells *qua* owner, and not as a *quasi* pledgee.⁵ § 451.
The effect
of resale
under the
section.

It has been held that where a party having a right to resell, wrongfully⁶ resells the goods at an undervalue, especially if he himself is the purchaser, the principle of *Armory v. Delamirie*⁷ applies, and the Court may in a very liberal spirit estimate what the goods should have fetched.⁸ § 452.
Effect of
wrongful
resale.
Unfair resale.

But it would seem that the proper course is to relegate the seller to the position of having to prove his damage in

¹ *Bishan Chand v. Radha Kishan Das*, (1897) 19 C. 489, citing *Ex parte Barrell*, L.R. 10 Ch. App. 512, and *Howe v. Smith*, L.R. 27 Ch. D. 89. and as to sales of land, see *Ibrahimkhani v. Fletcher*, (1896) 21 B. 827 F.B. and *Balvanta Appaji v. Whatkar Bira*, (1897) 23 B. 56 (Bench).

² *Manian Pattar v. The M. R. Co.*, (1905) 29 M. 118 A.C. 16 M. L.J. 37, citing *Wallis v. Smith*, L.R. 21 Ch. D. p. 258, and not following *Srinivasa v. Rathnasabapathi*, 16 M. 474; see also *Ockenden v. Henley*, (1858) E. B. & E. 485; *Hinton v. Sparkes*, (1868) L.R. 3 C.P. 161; *Lea v. Whitaker*, (1872) L.R. 8 C.P. 70; *Soper v. Arnold*, (1887) 35 Ch. D. 384, 37 Ch. D. 96.

³ See Benjamin 5th Ed. p. 935.

⁴ *Maclean v. Dunn*, (1828) 4 Bing. 722; *Howe v. Smith*, (1884) 27 Ch. D. 89 C.A.

⁵ Benj. 5th Ed. 950.

⁶ Meaning 'unfairly.'

⁷ (1722) 1 Str. 504, 1 Sm. L.C. 10th Ed. 343 where a master wrongfully removed a stone from a ring and refused to produce it, the Jury were told to assess damages at the value of the most precious stone that could fit the ring.

⁸ *Nanchand v. Mussa Hasein*, (1904) 6 Bom. L.R. 692. This rule is applied in England where a fiduciary relation exists: *Ershine v. Sacks*, (1901) 2 K.B. 505 C.A.; *Macoun v. Ershine*, (1901) 2 K.B. 493 C.A. (cases of stockbrokers), see § 652.

§ 452. the ordinary way, for section 39 of the Contract Act would apply; and the resale, however unfair, would amount to an election to end the contract¹ : he can certainly so frame his suit, but if he elects to sue solely under the section, he cannot change the nature of the suit on the resale being held to be void.² The English rule seems to be that if the resale has not been made in good faith or with due care, the buyer would have a right of action for any loss occasioned to him thereby, or might prove the facts in reduction of damages in an action brought against him by the seller.³

Invalid
resale.

Where the resale is not valid, the measure of damage is the difference between the contract rate and the market rate at the expiration of a reasonable time in which the resale should have taken place, according to an Allahabad decision.⁴ But there seems to be no reason for a departure from the ordinary rule. The right given to the seller includes the right to a reasonable time for effecting a resale, but if he does not exercise the power according to the terms of the section, there is no reason why he should obtain any benefit under it, and the due date should be the day on which to ascertain the market value.

Resale in
face of
tender.

If the resale is made in the face of a tender, the buyer can consider the resale as altogether tortious and bring an action for trover against the seller,⁵ but if he had not made a tender, his remedy for an abuse of the power of resale would be an action for such abuse.⁶

Where buyer
not in
default.

If the buyer has not been in default and the contract did not justify notice of resale,⁷ a resale is wrongful,

¹ *Hagedorn v. Laing*, (1815) 6 Taunt. 162; Benj 5th Ed. 942.

² *Buchanan v. Avdall*, (1875) 15 B. L. R. 276; see *M. S. E. Angullia v. Sassoon*, (1912) 16 C. W. N. 593.

³ Benjamin 5th Ed. 954; *Davis v. Hedges*, (1871) L.R. 6 Q. B. 687.

⁴ *Prag Narain v. Mul Chand*, (1897) 19 A. p. 541.

⁵ *Walter v. Smith*, (1822) 5 B. & Ald. 439; see *Martindale v. Smith*, (1841) 1 Q.B. 389.

⁶ Blackburn, 3rd Ed. 482.

⁷ See *Wilmshurst v. Bowker*, (1844) 12 L.J. Ex. 475.

and the buyer can sue either for non-delivery¹ or treat the contract as rescinded and sue for damages² and return of any part payment.³ Or he may sue in tort; if the resale was at a time when he was entitled to possession of the goods, he may sue for conversion⁴; but not if he was not entitled to possession.⁵

§ 452.

There is no express provision in the Contract Act protecting a buyer at a legitimate resale, unless the first exception to section 108 can be construed to apply to the case, but at Common Law the original buyer if not entitled to possession at the time of the resale could not claim the goods from a second buyer.⁶ It would seem that by his default the original buyer impliedly gave his consent to such resale and is consequently estopped from disputing it.

§ 453.
Position
of a buyer
at a
resale.

The position of a *bonâ fide* buyer at a wrongful resale is not free from doubt. It is not clear whether section 108, exception (1), covers the case of a seller in possession of goods sold.⁸ If that section does not apply the Common Law principles are applicable.⁹

§ 454.
Position
of buyer
at wrongful
re-sale.

The original buyer was only entitled to follow the goods if at the time of resale he was entitled to possession.¹⁰ If the seller immediately resold on the buyer's failure to pay where punctual payment was not of the essence of the contract, the buyer, unless at or before the resale he had tendered or paid all that was due,¹¹

¹ *Bowdell v. Parsons*, (1808) 10 East. 359; *Woolfe v. Horne*, (1877) 2 Q.B.D. 355.

² *Chinery v. Viall*, (1863) 29 L. J. Ex. 180 in tort; *Cohen v. Foster*, (1892) 61 L.J.Q.B. 648.

³ *Fitt v. Cassanet*, (1842) 4 M. & G. 898.

⁴ *Martindale v. Smith*, (1841) 1 Q.B. 389; *Chinery v. Viall*, (1860) 29 L.J. Ex. 180.

⁵ *Milgate v. Kebble*, (1841) 3

M. & G. 100; *Lord v. Price*, (1873) 43 L.J. Ex. 49.

⁶ See § 456.

⁷ Addison, 10th Ed. 580.

⁸ See under that section.

⁹ Now under the Factors Act of 1889 s. 8. and S. of G. Act s. 25 (1) the buyer is protected.

¹⁰ *Gosling v. Birnie*, (1831) 9 L.J.C.P. 105.

¹¹ *Walter v. Smith*, (1822) 5 B. & Ald. 439.

could not sue for the goods, as he was not entitled to possession,¹ although at the time of suit he was ready to pay.² But if he had not been in default and tendered the price within the contract time though after the resale, he could follow the goods.³

§ 455.
Proof
of resale.
Account
sales.
Resale
price.

Account sales have been held to be *prima facie* evidence of the amount realised at a sale of goods.⁴

In *Ruttonsay v. Jamnadas*, damages were given on resale rates,⁵ and in a later case it was said that the price obtained on resale may, in the absence of a market rate, be accepted as evidence of actual value⁶ and price obtained by the seller on a resale is presumptive

¹ *Gosling v. Birnie*, (1881) 9 L. J. C. P. 105.

² *Wilmshurst v. Bowker*, (1889) 5 Bing. N. C. 541, (1844) 7 M. & G. 882; *Milgate v. Kebble*, (1841) 3 M. & G. 100; *Lord v. Price*, (1874) L. R. 9 Ex. 54, but see *Adelphi Bank v. Halifax*, (1897) 4 T.L.R. 21 C.A.

³ See Benj 5th Ed. 949; *Donald v. Suckling*, (1863) 35 L.J.Q.B. p. 247; *Langton v. Higgins* (1859) 28 L.J. Ex. 252; *Lord v. Price*, (1874) L. R. 9 Ex. 54.

⁴ *Shearman v. Fleming*, (1870) 5 B. L. R. 619; *Mayen v. Alston*, (1892) 16 M. 238.

⁵ (1882) 6 B. 692 O.C.

⁶ *Jugmohandas v. Nasserwanji*, (1901) 26 B. 744, citing *Grebert v. Nugent*, (1885) 15 Q.B.D. pp. 89, 90; and compare cases where a buyer sues the seller for non-delivery and seeks to recover his loss owing to his being unable to complete a resale. The price obtained in a resale by a buyer is *prima facie* evidence of the

market value, *i.e.* if the resale took place in the ordinary course of Commerce, it is a reasonable test of the then value of the article. But where it was a special transaction in which a special price was given, in consequence of the peculiar exigencies of the purchaser, no such inference can be drawn. Therefore notice of resale in the former case would be unnecessary, in the latter it would probably be useless as affecting the damages recoverable. Maine on 'Damage' 6th Ed. p. 211 cites *Engel v. Fetch*, (1869) L. R. 4 Q. B. p. 667, 38 L. J. Q. B. p. 306; *Godwin v. Francis*, (1870) L. R. 5 C.P. 295, 39 L. J. C. P. 121, 22 L.T. 338; *France v. Gaudet*, L. R. 6 Q.B. 199, 40 L. J. Q. B. 121; *Horne v. Midland Ry. Co.* L. R. 8 C. P. 131; *Thol v. Henderson*, 8 Q.B.D. 457. (See Maine on 'Damages' 6th Ed. p. 189. These are cases of resale by the buyer illustrating the damages he can recover for breach of the first contract; See § 652).

evidence of their value.¹ But if it is intended to use the price obtained of a resale as evidence of the market rate or value, it must be tendered as evidence thereof and the question as to the market rate expressly raised.²

The section is not exhaustive or imperative, and the seller has other remedies. If the property has passed and the buyer refuses to accept and pay for the goods, the seller may resell under section 107 or he may sue the buyer for the price of the goods, delivery having been waived by the buyer's default in rejecting a tender thereof,³ and he may sue the buyer for reasonable charges for the care and custody of the goods.⁴ The omission to exercise the power of resale under section 107 does not affect the right to recover the balance of the purchase money for goods bargained and sold.⁵

§ 456.
Other
remedies
of seller.

Suit for
price.

If the buyer's default amount to a repudiation of the contract, the seller, instead of reselling under section 107, may avoid the contract and sue for damages under section 55,⁶ and the property then reverts in him and he can resell without giving notice⁷ as owner. This right also arises in such circumstances even if the property has not passed under the contract.⁸ If the buyer has not performed a condition precedent to his right of possession,⁸ the seller is discharged if he so elects, and can refuse delivery and resell and sue for damages.

Rescission

¹ *Stroud v. Austin*, (1883) Cab. & E. 119, Benj. 5th Ed. 807.

² *Yule v. Mohamed Hussain*, (1896) 24 C. 124, 126.

³ *P. R. & Co. v. Bhagwandas*, (1909) 11 Bom. L. R. 385, 34 B. 192 C. A., and see § 332, *Finlay Muir v. Radhakissen*, (1908) 36 C. 786; see Civil Pro. Code, 1908 Appendix A., form 3.

⁴ *Greaves v. Ashlin*, (1813) 3 Camp 426; see S. of G. Act s. 37.

⁵ *Shoshi Mohun Pal v. Nobo Kristo Poddar*, (1878) 4 C. 801; *Buldeo v. Howe*, 6 C. 64.

⁶ *Buldeo Dass v. Howe*, (1880) 4 C. 64.

⁷ *Nga Shwe Tw v. Nga Chit*, U B R. (1905) Contract 9.

⁸ *Wilmshurst v. Bowker*, (1841) 12 L. J. Ex. 476; *Woolfe v. Horne*, (1877) 2 Q. B. D. 355; *Rhymney Ry. v. Brecon Ry.*, (1900) 69 L. J. Ch. 818.

§ 456
Seller need
not resell.

The vendor is not obliged to go into the market and resell goods refused by his purchaser in order to recover his damages, but he is bound to act as a reasonable man of business in the matter and cannot claim any damages beyond the loss which a man so acting would sustain.¹

Rescission
under s. 55.

For the Indian rule requires every party to mitigate damages.² But subject to section 73, where section 55 or section 39 applies, the seller may, instead of reselling, avoid the contract; in which case he can sue for any damages suffered³ but must restore any benefit he has received under the contract.⁴ But if he resells after avoiding the contract, it seems that he need not account for any profit made. In England, as a general rule, a seller avoiding a contract on repudiation, need not return any part of the price that has been paid⁵; he only need do so if the goods are resold at a profit. This is probably the same in India, as benefit under section 64 seems to mean net benefit.

Right to
resell to
ascertain
damages
apart from
section.

Pontifex J., said that the Contract Act appears to have taken away the power⁶ of selling the goods to ascertain damages: section 107 requires notice, and, consequently, if no notice is given there is no power to resell.⁷ It was argued in reply to this that the Contract Act by giving another remedy to the vendor did not derogate from the power possessed originally under the Common

¹ Cf. *Mackertick v. Nolo Coomar*, (1903) 30 C. 477, O. C.; see § 652 as to the buyer's duty to mitigate damages; see Bullen and Leake, 6th Ed. 275; *Brown v. Muller*, L. R. 7 Ex. p. 322 41 L. J. Ex. 214; *Roper v. Johnson*, L. R. 8 C. F. p. 182, 42 L. J. C. P. 65; *Dunkirk Colliery Co. v. Lever*, 9 Ch. D. p. 25; *Nickoll v. Ashton*, (1900) 2 Q. B. p. 305, 69 L. J. Q. B. 640.

² Contract Act s. 73 explanation. See § 652.

³ See § 75.

⁴ See § 64.

⁵ *Howe v. Smith*, (1884) 27 Ch. D. 89 C. A.

⁶ Semble there never was such a power save in the case of perishable goods.

⁷ *Buchanan v. Avdall*, (1875) 15 B. L. R. p. 284, a decision largely on the pleadings.

Law.¹ This is doubtless a sound view ; but the question is what powers of resale existed at Common Law, and that will be discussed later.²

Apparently the seller can resell in certain cases apart from the provisions of the section as where the goods are of a perishable nature or the market is a fluctuating one. This was the Common Law,³ and the section does not seem to have altered the rule.⁴ It seems that in such a case the seller would be an agent of necessity.⁵

§ 457.
Right apart
from the
Act.

At any rate the price obtained on a fair resale in such a case would, it seems, be treated as *prima facie* evidence of the market rate. And it is quite clear that all questions of reasonable notice would be considered with regard to the necessity for prompt action, especially as section 73 imposes a penalty on a party not availing himself of opportunities to reduce the damages.

Although no such suggestion has been made, it would seem that in a contract for perishable goods the parties must be taken to have intended that time should be of the essence of the contract; at any rate the time for acceptance must be intended to be within the time in which such goods could be sold in a marketable condition. The seller if he acts reasonably might claim to be entitled under section 55 to avoid the contract and resell as owner, in which case he must restore any net advantage obtained under section 64 and can sue for damages under section 75. It is clear that under section 64 the buyer would not be entitled to any profit on a resale, nor was he, it seems,

Where goods
perishable
time of the
essence.

¹ But Benjamin's view is that s. 107 faithfully represents the C.L. 5th Ed. p. 938.

² See § 457.

³ *Maclean v. Dunn*, (1828) 4 Bing. 722 approved in *Gosling v. Birnie*, (1831) 7 Bing. 839; *Fitt v. Cassanett*, (1842) 4 M. & G. 898 ;

Blackburn remarks that the *dicta* are *obiter*, but probably the law was as stated, 2nd Ed. 469.

⁴ For a similar way of interpreting s. 48 (3) of the Sale of Goods Act, see Benj. 5th Ed. 954 and see § 441.

⁵ Benj. 5th Ed. 950.

§ 457. at Common Law.¹ The buyer would not be liable for the price² but only for damages.

Meaning of
'perishable'

The meaning of the word 'perishable' has not been defined by the English Act, which gives a right of resale in the case of perishable articles without any notice³; but it seems to mean not only goods which are such as to deteriorate physically by being kept, but also when they are such as to be subject to deterioration in a commercial sense, so as likely to become unmerchantable as such, although their physical substance be not likely to change,⁴ and it seems the rule applies where the price is perishable.⁵

§ 458.
Right given
by con-
tract.

A clause in a contract giving an option to the seller in case of the buyer's default in taking delivery to resell the goods and charge the buyer with any loss and expenses is valid,⁶ and is not limited in its operation to cases in which the property in the goods, the subject matter of the agreement, has passed to the buyer.⁷ In *Moll Schutte's*⁷ case the agreement was to sell ten cases of goods to be shipped to Calcutta, and the sellers only shipped ten cases and tendered them to the buyer, and the goods were of the contract quality. They had appropriated the goods to the contract and done all in their power to specify the goods as the subject of the contract, and were accordingly held entitled to resell them against the

¹ There is no authority on the point; Benj. 5th Ed. 938, 945 argues, he would not. But the contrary is stated by Blackburn, 3rd Ed. 482 and by Benj. 2nd Ed. 648, 4th Ed. 797, relying on *Greaves v. Ashlin*, (1813) 3 Camp. 426; which in the 5th Ed. p. 941 is said to be overruled by *Maclean v. Dunn*, (1828) 6 L. J. C. P. O. S. 184.

² *Chinery v. Viall*, (1860) 29 L. J. Ex. 180.

³ See s. 48 (3).

⁴ See *Asfar v. Blundell*, (1896) 1 Q.B. 123; *Dakin v. Oxley*, (1864) 15 C. B. N. S. 646.

⁵ *Maclean v. Dunn*, (1828) 4

Bing. 722.

⁶ See Civil Pro. Code, 1908, App. A. Form 6.

⁷ *Moll Schutte v. Luchmi Chand*, (1898) 25 C. 505 F.B. followed in *Best v. Haji Mohamed*, (1898) 28 M. 18, overrules *Yule v. Mohamed Hossain*, (1897) 24 C. 124, 1 C. W. N. 71 and *dicta* in *Clive Jute Mill v. Ebrahim Arab*, (1897) 24 C. 177; *Basdeo v. Smidt*, (1899) 22 A. 55. When a seller was given a right to resell on failure to pay by a fixed date, a resale without notice to the buyer was held to be good; *Tukku Singh v. Honumans*, (1902) 7 C. W. N. 108.

buyer under such a clause. But where the sellers sold 700 tons of sugar and imported it in bulk and did not separate any portion or in any way appropriate any portion or tender it, and, after notice to the buyer, resold a certain quantity which remained unseparated from the bulk until after the resale, it was held that there were no goods ascertained or even appropriated to the contract and the goods resold were in no sense the subject of the contract, and therefore a clause giving an option to resell did not apply.¹ A clause might be so framed as to cover even such a case.¹ § 458.

A seller selling under a power must duly follow its terms.²

Generally such a clause provides that the seller shall be entitled to any profit on the resale, and even if it does not, it seems that the buyer could not claim any profit³ any more than a seller, under a contract allowing the buyer to purchase elsewhere on the seller's default and charge him with the difference, can claim the difference if the buyer acting under such a clause purchases at a lower rate.⁴ Profit on resale.

Benjamin⁵ considered the position of a seller proceeding under a power of resale in his contract to be less advantageous than where he resells apart from any special power. He stated "where the sale is thus conditional (that is the seller has expressly reserved the right of Position of seller.

¹ *Angullia Co. v. Sassoon & Co.*, (1912) 39 C. in the C. A. (not yet reported), 16 C.W.N. 593, the sellers called on the buyer to take delivery, but only of goods in bulk. In the course of argument, Woodroffe, J., pointed out that "resell" was an incorrect word, as the contract contemplated the sale of goods against the buyer which had not been sold to him: he suggested the clause meant a right to sell similar goods against the buyer if he failed to take delivery: it was held that a clause

might be so framed as to give that right. In *Best v. Haji Mohamed*, (1898) 23 M. 18. the goods were not separated, but the point was not raised.

² *Lamond v. Davall*, (1847) 9 Q. B. 1930; S of G. Act s. 484 (4).

³ Benj. 5th Ed. 945.

⁴ *Simmons v. Millar*, (1889) 15 T. L. R. 100.

⁵ 2nd Ed. 648, 4th Ed. 797; in Blackburn 3rd Ed. 500, this passage is cited with approval.

§ 458. re-sale) the vendor's rights are very different from those which exist in the absence of an express reservation of power to resell, and he is in *duriori casu*. He runs all the risk of a resale without any chance of a profit, for he has clearly no right to the surplus if the goods are sold for a higher price at the resale.¹ But where such express reservation does not exist, the effect of a resale not being to rescind the sale, the goods are sold by the unpaid vendor *quâ* pledgee, and as though the goods were pawned to him: they are sold as being the property of the buyer who is of course entitled to any excess if they sell for a higher price than he agreed to give." But under section 107 this is not so and the editors of the fifth edition, Benjamin,² doubt the whole of the passage, and contend that *Lamond v. Davall*³ shows that there is no distinction between the two positions, and in no case can the buyer claim the profit.

§ 459.
Reserva-
tion of a
right of
disposal.

The reservation by the seller of a right of disposal involves *primâ facie* the existence of a condition precedent to the passing of the property to be performed by the buyer, and therefore gives the seller a power to dispose of the goods, at any rate, so long as the buyer is in default.⁴ If the buyer previous to the exercise of the seller of his power to resell, tenders performance of the condition within the time allowed by the contract, a resale would be tortious.⁵ A resale, while the buyer was in default, would be a rightful rescission within section 75 of the Contract Act and the seller could sue for any loss sustained through the non-fulfilment of the contract.⁶

¹ Citing Sugden on 'Vendors and Purchasers' 14th Ed. 39: *ex parte Hunter* (1801) 6 Ves. 94, 97. This is not so in India; the seller need not account for a profit; s. 65 does not apply, *Oriental Co. v. Narasimha*, (1901) 25 M. p. 214.

² Page 945.

³ (1847) 16 L. J. Q. B. 136, *see*

also *Chinery v. Viall*, (1860) 29 L. J. Ex. 180.

⁴ *Ogg v. Shuter*, (1875) 1 C. P. D. 47 C. A.

⁵ *Mirabita v. Imperial Ottoman Bank*, (1878) 3 Ex. D. 164 C. A.

⁶ *Ryan v. Ridley*, (1902) 8 Com. Cas. 105.

If the property has not passed, the seller can resell the goods as owner and give a good title to the buyer. It may be that he commits a breach of contract in consequence of such resale, but until the property has passed the buyer has only a remedy *in personam*.

§ 460.
Where
property
not passed.

The seller may avoid the contract whether the property has passed or not if the case comes within the purview of section 55,¹ and can, in such a case and also if section 39 applies, recover any damages which he has sustained by the breach of the contract.² For even if he has resold the goods the contract is not so far rescinded that he cannot sue for damages.³

§ 461.
Right to
rescind
where pro-
perty not
passed.

It was held that if the sale is a sale of things of quantity generally and the vendor will fulfil his contract by delivering any articles of the character and description mentioned in the contract, the vendor may, after he has recovered possession by exercise of the right to stop, resell them, but he may be obliged to furnish other goods answering to the contract on tender of the price by the consignees.⁴ But it seems that the property would have passed on shipment and the seller cannot resell except under section 107 or unless the delay was such that it amounted to repudiation, in neither of which cases could the buyer afterwards claim delivery.

In America, if a fair public sale is made by the vendor after advertisement, the selling price is to be taken as the market price, even if the vendor buys himself.⁵

§ 462.
American
law.

The right to fix the price by a resale is especially clear if the property is of such sort as depreciates rapidly.⁶

¹ *Buldeo Dass v. Howe*, (1880) 6 C. 64 C. A. (1903) 30 C. 649.

² See § 75.

³ *Maclean v. Dunn*, (1828) 6 L. J. C. P. (O. S.) 184; *Page v. Cowasjee*, (1866) L.R. 1 P. C. 127, 145; see *Haridas v. Kalumull*,

⁴ *Clay v. Harrison*, 10 B. & C. 99, 8 L. J. (O. S.) K. B. 90.

⁵ *Ackerman v. Rubens*, (1901) 167 N. Y. 405.

⁶ *Puritan Coke Co. v. Clark*, 204 Pa. St. 556.

CHAPTER XV.

Sales by Non-Owners.

Section 108.
Title
conveyed
by seller
of goods to
buyer.

No seller can give to the buyer of goods a better title to those goods than he has himself, except in the following cases :—

Exception 1.—When any person is, by the consent of the owner, in possession of any goods, or of any bill of lading, dock-warrant, warehouse-keeper's certificate, wharfinger's certificate, or warrant or order for delivery, or other document showing title to goods, he may transfer the ownership of the goods of which he is so in possession, or to which such documents relate, to any other person, and give such person a good title thereto, notwithstanding any instructions of the owner to the contrary ; provided that the buyer acts in good faith and under circumstances which are not such as to raise a reasonable presumption that the person in possession of the goods or documents has no right to sell the goods.

Exception 2.—If one of several joint-owners of goods has the sole possession of them by the permission of the co-owners, the ownership of the goods is transferred to any person who buys them of such joint-owner in good faith, and under circumstances which are not such as to raise a reasonable presumption that the person in possession of the goods has no right to sell them.

Exception 3.—When a person has obtained possession of goods under a contract voidable at the option of the other party thereto, the ownership of the goods is transferred to a third person who, before the contract is rescinded, buys them in good faith of the person in possession ; unless the circumstances which render the contract voidable, amounted to an offence committed by the person in possession or those whom he represents.

In this case, the original seller is entitled to compensation from the original purchaser for any loss which the seller

may have sustained by being prevented from rescinding the contract.

Illustrations.

- (a) *A* buys from *B*, in good faith, a cow which *B* had stolen from *C*. The property in the cow is not transferred to *A*.
- (b) *A*, a merchant, entrusts *B*, his agent, with a bill of lading relating to certain goods, and instructs *B* not to sell the goods for less than a certain price, and not to give credit to *D*. *B* sells the goods to *D* for less than that price, and gives *D* three months' credit. The property in the goods passes to *D*.
- (c) *A* sells to *B* goods of which he has the bill of lading, but the bill of lading is made out for delivery of the goods to *C*, and it has not been indorsed by *C*. The property is not transferred to *B*.
- (d) *A*, *B* and *C* are joint Hindu brothers, who own certain cattle in common. *A* is left by *B* and *C* in possession of a cow, which he sells to *D*. *D* purchases *bonâ fide*. The property in the cow is transferred to *D*.
- (e) *A* by a misrepresentation not amounting to cheating, induces *B* to sell and deliver to him a horse, *A* sells the horse to *C* before *B* has rescinded the contract. The property in the horse is transferred to *C*, and *B* is entitled to compensation from *A* for any loss which *B* has sustained by being prevented from rescinding the contract.
- (f) *A* compels *B* by wrongful intimidation, or induces him by cheating or forgery, to sell him a horse, and, before *B* rescinds the contract, sells the horse to *C*. The property is not transferred to *C*.

Section 108 is like the greater part of the Contract Act badly expressed and shows clearly how very sketchy the

§ 403.
English
Law.

§ 463.
English Law.

drafting is. The Sale of Goods Act illustrates the deficiencies of this section. Section 21 enacts that subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell. The two provisos to the section, "save enactments enabling the apparent owner of goods to dispose of them,"¹ and sales under Common Law or statutory powers,² or under an order of a court of competent jurisdiction.

Attached
goods.

If goods are attached by the seller's creditors, a buyer holds them subject to the creditor's rights.³ There is no question of notice as in England.⁴

Current coin
and negoti-
able instru-
ments.

Current coin and negotiable instruments are not subject to the section. Neither does the section apply to passing of Government promissory notes for money.⁵

Shares.

Shares are goods within the meaning of the section.⁶ This follows from the wide definition given to goods under the Code.⁷

§ 464.
Section
does not
limit
statutory
powers.

It must be noted that this section does not limit in any way the statutory powers given in India to the Official Assignee to sell, or to the Official Receiver, or to courts of

¹ The Editors of Benjamin 5th Ed. p. 9 do not know to what this refers: Chalmers 5th Ed. p. 54 suggests the Bills of Lading Act, Bankruptcy Act (reputed ownership), Bills of Sales Act.

² See § 464.

³ Civil Pro. Code 1908 s. 64 O. XXI r. 59. See *Mohanlal v. Chunilal*, (1908) 4 Bom. L.R. 814.

⁴ S. of G. Act s. 28 (1).

⁵ *Dasaundi v. Imam-ud-din*, 18 P. R. 1905.

⁶ *R. D. Sithna v. National Bank*, (1910) 12 B. m. L. R. 870.

⁷ See illustration to s. 88; in England certificates of Railway stock were held not to be goods within the Factors Act of 1842, *Freeman v. Appleyard*, (1862) 32 L. J. Ex. 175 nor blank transfers of shares; *Williams v. Colonial Bank*, (1888) 38 Ch. D. 388.

law,¹ or to executors and administrators, or to finders of goods,² or to pawnees,³ or to landlords distraining for rent; nor does it affect the position of a trustee selling and the limited rights of the *cestui qui* trust to follow trust property⁴; nor the powers of a master of a ship in certain circumstances of necessity,⁵ for his powers are derived from the law merchant, and this section does not cover the case.

§ 464.
Official Assignee.

Master of Ship.

Further the section does not control the powers of agents to bind their principals⁶ or of partners, or of mortgagees, allowed by the owner to carry on a business, and effect sales in the ordinary course of such business,⁷ nor does it limit the law of estoppels,⁸ of which it is itself an instance.

Agents.
Mortgagees.
Estoppel.

A true owner may preclude himself from denying the authority of a non-owner to sell. This rule, however, was and is not of much practicable assistance to buyers or lenders, as in England it has been held that the mere fact that the owner has given possession to a person who or whose bailee deals with the goods without authority, does not estop the owner as against an innocent buyer or pledgee,⁹ nor does a person whose employment consists in dealing with other men's goods in one way acquire by

§ 465.
Title by estoppel.

¹ Civil Pro. Code, 1908 s. 51, O. XXI, see Trustees Act XXVII of 1866 ss. 7, 22, 25, 26.

² Contract Act s. 169.

³ Contract Act s. 176.

⁴ Trust Act II of 1882; *Sander Deo v. Bhagwan*, (1908) 80 A. 165.

⁵ *Page v. Cowasjee*, (1866) L.R. 1 P.C. p. 144; *Australian S. N. Co. v. Morse*, (1872) L.R. 4 P.C. 222; *Acalos v. Burns*, (1878) 3 Ex. D. 282 C.A.; *Kaltenback v. Mackenzie*, (1878) 3 C.P.D. p. 473; *Atlantic Mutual Ins. Co. v. Huth*, (1880) 16 Ch. D. 474 C.A.

⁶ Contract Act s. 237.

⁷ *National Mercantile Bank v. Hampson*, (1880) 5 Q.B.D. 177;

Taylor v. McKeand, (1880) 5 C.P.D. 358; cf *Gough v. Wood*, (1894) 1 Q.B. 713 C.A.

⁸ Evidence Act s. 115, Contract Act s. 237.

⁹ *Weiner v. Gill*, (1905) 2 K.B. 172; *Johnson v. Crédit Lyonnais*, (1877) L.R. 3 C.P.D. p. 39; *Farquharson v. King*, (1902) A.C. 325, but see *Bryce v. Ekrmann*, (1904) 7 F. 5. Considered in *Truman v. Attenborough*, (1910) 26 T.L.R. 601. No estoppel arises where goods are delivered for sale or return, if the property is not to pass until payment; *ibid.*, *Edwards v. Vaughan*, (1910) 26 T.L.R. 349 affirmed in C.A.; *ibid.* p. 545.

§ 465. possessing goods in the course of that employment, ostensible authority to deal with them in any other way.¹

But the buyer may rely on any admission of the owner's which, if true, would have given him a good title to the goods, if in fact he purchased relying on that statement,² and would be prejudiced if the seller were allowed to contradict it.

Estoppel by
attornment.

The case of sellers consenting to sub-sales has already been discussed, of which class of case *Henderson v. Williams*³ is one of the strongest: there the owners were induced by Fletcher who pretended to be the agent of a well-known customer, to instruct Williams to transfer goods to Fletcher's order. Fletcher sold the goods to the plaintiff who, after obtaining a statement from Williams that he held the goods to his, the plaintiff's order, innocently paid for them. Lord Halsbury said that the owners were estopped from claiming the goods after allowing Fletcher to hold himself out as owner.

Buyer must
be prejudic-
ed.

In all cases when a party has been estopped from denying that the property has passed, there must have been a representation that it had passed or that the buyer's title was complete, and the buyer must have altered his position relying on such representation. Unless he has been prejudiced, which is a question of fact,⁴

¹ *Cole v. N. W. Bank*, (1875) L.R. 10 C.P. p. 369.

² *Pickard v. Sears*, (1837) 6 A. & E. 469; *Freeman v. Cooke*, (1848) 18 L.J. Ex. 114; *Gregg v. Wells*, (1839) 10 A. & E. 90; *Simm v. Anglo-American Telegraph Co.*, (1879) 5 Q.B.D. 188, 215, 216. If he knew the truth there is no estoppel, but if there is an estoppel in favour of a person, he can give a good title to a purchaser, from him whatever such purchaser's knowledge may be. *Sarat Chunder*

Dey v. Gopal Chunder Laha, (1892) 19 I. A. 203, 220.

³ (1895) 1 Q.B. 521 C.A.; *Woodley v. Coventry*, (1863) 32 L.J. Ex. 185; *Knights v. Wippen*, (1870) L.R. 5 Q.B. 660; *Dixon v. Kennaway*, (1900) 1 Ch. 833; *Seton v. Lafone*, (1887) 19 Q.B.D. 68 C.A.; *J. C. Shaw v. Bill*, (1884) 8 M. 38.

⁴ *Kingston upon Hull v. Harding*, (1892) 2 Q.B. p. 506; *Foster v. Tyne Pontoon Co.*, (1894) 63 L.J. Q.B. 50.

there is no estoppel.¹ There is sufficient prejudice if, after paying for goods, a buyer is assured that they are available for the contract, and he is thereby induced to rest satisfied and to take no further steps for his protection, if he loses anything by so doing.¹ But the mere payment of money which can be recovered is not sufficient prejudice,² unless there is trouble and expense coupled with delay in recovering it.³

§ 465.

The mere issue of a delivery order is not sufficient to raise an estoppel,⁴ but it may do so if the form indicates that the goods are free from lien, and if the other circumstances show an intention that it should be acted by the buyer.⁵

Issue of documents of title.

As stated before ⁶ cases of bailees assenting to sub-sales depend on two doctrines, that of attornment and that of estoppel. A sub-buyer cannot recover the goods or damages against a bailee, unless he can aver that the property in the goods had passed to him. Mere attornment only completes the title when the goods are ascertained and nothing further remains to be done to them by the seller or the bailee on his behalf to ascertain the price or to make the goods deliverable. If the seller or the bailee has to do anything to the goods the property has not passed to the first buyer and the authority of the bailee to deliver is conditional on the thing being done and on failure of the consideration for the authority, as on insolvency of the original buyer, may be revoked. Mere attornment

Assent to sub-sales.

Where property has not passed to the first buyer.

¹ *Dixon v. Kennaway*, (1900) 1 Ch. 888; *Knights v. Witten*, (1870) L. R. 5 Q. B. 660; *Ogilvie v. W. Australian Co.*, (1896) A.C. p. 270 P. C.

² *Carr v. L. & N. W. Ry.*, (1875) L.R. 10 C.P. pp. 317, 318.

³ *Compania Naviera Vasconzada v. Churchill*, (1906) 1 K.B. 287, 250.

⁴ *Farmeloe v. Bain*, (1876) 1 C.P.D. 445; *Mordaunt v. British Oil Mills*, (1910) 2 K.B. 502. It was said to be a promise *in futuro*: *Gillman v. Carbutt*, (1889) 61 L. T. 281.

⁵ *Merchant Banking Co. v. Phoenix*, 1876, 5 Ch. D. 205, 285; *Anglo-India Jute Mills v. Omade-mull*, (1911) 34 C. 127.

⁶ See § 357.

§ 465.

Knowledge
of subbuyer.

Mere state-
ment that a
document of
title is in
order.

in such a case does not complete the sub-buyer's rights.¹ If the sub-buyer knows the facts no estoppel can arise, no matter what the bailee does, but if the sub-buyer is ignorant of the facts which prevent the property passing, a bailee who by attorning represents in effect that the property has passed and thereby induces the buyer to alter his position, is estopped from setting up that it has not.² But a mere assurance that a delivery order is in order means that the bailee will carry out his contract to deliver by delivering to the person presenting the delivery order subject to the terms of the original contract.³ To raise an estoppel there must be a representation that the property has passed³ or an intention to induce or permit the other party to believe that the price has been paid.⁴ All the cases where the bailee was held to be estopped turned on more than mere attornment where the goods were unascertained.⁵ *Gillet v. Hill*,⁶ which is cited as against this view,⁷ was a case where the sacks sold were specific and a delivery order was accepted generally, and cases of unascertained goods were distinguished. It

¹ *Umwin v. Adams*, (1858) 1 F. & F. 312.

² *Per* Blackburn J. on *Biddle v. Bond*, (1865) 6 B. & S. 225, approved in *Henderson v. Williams*, (1895) 1 Q. B. p. 534; see *Stmm v. Anglo-American Telegraph Co.*, 5 Q. B. D. p. 202, 211, 216, where *Knights v. Wiffen*, (1870) 32 L. J. Ex. 185 is explained as depending on an admission that the goods were separated.

³ *Mordaunt v. British Oil Mills*, (1910) 2 K. B. 502. At any rate it may only mean that, and if there is any ambiguity there is no estoppel, for every estoppel must be certain to every intent and not be taken by argument or inference. *Rani Mewa Kuwar v. Rani Hulas*

Kuwar, (1874) 1 I. A. 161; *Law v. Bouveric*, (1891) 3 Ch. p. 118; but see *ibid* p. 106

⁴ *Anglo-India Jute Mill v. Omademull*, (1911) 38 C. 127, following *Merchant Banking Co. v. Phoenix*, 5 Ch. D. p. 285.

⁵ *Stonard v. Dunkin*, (1810) 2 Camp. 344; *Gosling v. Birnie*, (1831) 7 Bing. 339; *Holt v. Griffin*, (1838) 10 Bing. 246; *Woodley v. Coventry*, (1863) 2 H. & C. 164; *Hawes v. Watson*, (1824) 2 B. & C. 540; *Coventry v. G.E.R.*, (1883) 52 L. J. Q. B. 604, 11 Q. B. D. 776. (two delivery orders for the same goods).

⁶ (1834) 2 Cr. & M. 530.

⁷ *Laws of Eng.* Vol. II p. 408.

was suggested that the buyer must know that goods are not ascertained if the order is accepted and it was said that an acceptance of an order means that the goods will be separated and appropriated. But that as being a promise *in futuro* would not raise an estoppel.¹ It was held in an early case that a bailee on receiving notice from a buyer which showed that the buyer thought the goods were available for him, must reply promptly if he wishes to set up a lien, and that after four days' delay he was not at liberty to set up that he was unpaid.² But there is no other authority for saying a bailee always owes any duty to a sub-buyer, and unless there is such a duty no estoppel could thus arise.³ It was argued recently that a bailee on notice from a sub-buyer of his purchase must give notice of his lien. The last case³ was not cited and the argument was rejected.⁴

§ 465.

Promise *in futuro*.

Duty of bailee to give notice of his title.

In England where the plaintiffs gave *N* a blank delivery order, they were held to have given him implied authority to fill it in, and were estopped from showing the authority was limited.⁵ But where the plaintiffs gave *N* a filled in delivery order which was altered by him and goods were delivered thereunder to an innocent buyer, it was held that the plaintiffs were not guilty of any negligence which was the proximate cause of the wrongful delivery and the goods could be covered.⁵

Delivery order in blank.

¹ *Gillman v. Carbutt*, (1889) 61 L. T. 281; even notice of an intention to abandon a right does not raise an estoppel, *Chadwick v. Manning*, (1896) A. C. 231 P. C., approving *Jorden v. Moncy*, 5 H. L. C. 185.

² *Green v. Haythorne*, (1816) 1 Stark. 447.

³ *Coventry v. G. E. Ry.* 11 Q. B. D. p. 780; *Swan v. N B. Australian Co.*, 2 H. & C. 175, *secus*, if there is also any misrepresentation, *Munnoo Lall v. Lalla Choonee*, (1873) 1 I. A. 144, 156.

⁴ *Mordaunt v. British Oil Mills*, (1910) 2 K. B. 502 (where

there was part delivery to the sub-buyer of goods paid for), citing *Farmeloe v. Bain*, (1876) 1 C.P.D. 445.

⁵ *The Union Credit Bank v. The Mersey Dock*, (1899) 2 Q. B. 205; *Wahidunnos v. Surgadass*, (1879) 5 C. 39 C.A.; Contract Act s. 238 illus. (b). *cf.* Negotiable Instruments Act XXVI of 1881, s. 20 as to blank negotiable instruments and see for apparent authority of officers of companies, *George Whitechurch v. Cavanagh*, (1902) A. C. 117; *Ruben v. Great Fingall*, (1904) 2 K. B. 712 C. A.

§ 465. The first part of this decision would clearly be good law in India: and it seems that if an owner gave delivery orders to an agent for 10 tons, it could not be said that after the orders had been forged by altering the 10 into 100 that the owner's consent to their possession by the agent subsisted.¹

§ 466.
Enabling.

The English rule that "wherever one of two innocent persons must suffer by the acts of a third he who has enabled such third person to occasion the loss must sustain it"² must be also considered; but the rule is of little assistance as the word "enabled" is indeterminate. It seems that the owner must have done some act on which the purchaser has relied and owing to which he has been misled: e.g., by holding out a person as having authority to sell: and it is not sufficient that he has been careless.³

But in this connection it must be noted that English cases are no certain guide, as the Indian law is wider, as will be pointed out *infra*.

§ 467.
Estoppel
in India

For the Indian law on Estoppel see Evidence Act section 115, and cases cited in the note.⁴

§ 468.
Common
Law.

At Common Law the general rule was as stated in the section apart from the exceptions. An innocent purchaser acquired no title if he bought from a person who had no

¹ See Contract Act s. 238, illus. (b), *Grant v. Norway*, (1851) 10 C. B. 604, cf. *Ruben v. Great Fingall Consolidated*, (1906) A. C. 439; *Whitechurch v. Cavanagh*, (1902) A. C. 111, and see the elaborate judgment of the H. of L. in *Scholfield v. Londesborough*, (1896) A. C. 514 (spaces left in bill of exchange),

² See 1 Sm. L. C. 11th Ed. 701.

³ *Farquharson v. King*, (1901) 2 K. B. 697 C. A.; (1902) A. C. 325 H. of L.

⁴ *J. C. Shaw v. Bill*, (1884) 8 M. 38 (as to bailee attorning); *Ram Pertab v. Marshall*, (1889) 26 C. 701 (agent's apparent authority); cf. Contract Act s. 237; *Anglo-India Jute Mills v. Omademull*, (1911) 38 C. 127 C. A. (as to owners assenting to transfers).

title,¹ even if he resold the buyer had no title against the true owner.² § 468.

The exceptions³ to the general rule at Common Law were cases in which the doctrine of estoppel applied ; sales in market overt, which were, it seems, never recognised in India ; and sales by a person in whom the property was vested under a voidable contract, before such contract was avoided. Exceptions.

In order to facilitate commerce a series of acts are passed in England called the Factors Acts.⁴ The three first English Acts were extended to India by Act XIII of 1840 and Act XX of 1844.⁵ The joint effect of those three Acts was summed up by Blackburn, J. ;⁶ after reviewing the history and policy of the Acts, he proceeds to say : " We do not think that the legislature wished to give to all sales and pledges in the ordinary course of business the effect which the Common Law gives to sale in market overt. The general rule of law is that where a person is deceived by another into believing that he may safely deal with property he bears the loss, unless he can show that he was misled by the act of the true owner. The legislature seems to us to have wished to make it the law that, where a third person has entrusted goods, or § 469. English Factors Acts.

¹ E.g. a buyer of treasure trove *Att.-Genl. v. British Museum Trustees*, (1903) 2 Ch. 588; *The Telegrapho*, (1871) L. R. 3 P. C. p. 685 (goods taken piratically); *Cooper v. Willomat*, (1845) 1 C B 672, 19 L. J. C. P. 219 (fraudulent sale of bailee); *Hollins v. Fowler*, (1875) L. R. 7 H.L. 757 (sale by broker); *Cundy v. Lindsay*, (1878) 3 Ap. Ca. 459 (goods obtained by fraud); *Helby v. Matthews*, (1895) A.C. 471 (hire purchase agreement) ; see for the principle *Colonial Bank v. Whitney*, (1886) 11 Ap. Ca. p. 435 and *Cahn v. Pockell*, (1899) 1 Q.B.

p. 659 C.A. See also *Sarat Chunder Dey v. Gopal Chunder Laha*, (1892) 19 I. A. 203.

² *Lee v. Bayes*, (1856) 18 C. D. 597, 25 L. J. C. P. 249 (stolen goods sold at auction).

³ See *Fuentes v. Montis*, (1868) L. R. 3 C. P. p. 276.

⁴ In 1823, 1825, 1842 and subsequently to the Contract Act in 1877 and 1889.

⁵ See *G. I. R. v. Hanmandas*, (1889) 14 B. 57, and are repealed by the Contract Act.

⁶ *Cole v. N. W. Bank*, (1875) L. R. 10 C. P. 354 & p. 372.

§ 469. the documents of title to goods, to an agent who, in the course of such agency, sells or pledges the goods, he should be deemed by that act to have misled any one who *bonâ fide* deals with the agent and makes a purchase from or advance to him without notice that he was not authorised to sell or to procure the advance." The former Acts, *i.e.* prior to the Factors Act of 1889, applied only to persons entrusted as factors or commission merchants, not to persons¹ to whose employment a power of sale is not ordinarily incident, as a wharfinger.¹

English Law. But it was also held that a mere insurance agent who on a particular occasion was entrusted with pictures to sell on commission, was within the Act of 1842.²

A mercantile agent entrusted in some other capacity was held not to be within the Acts³ such as a broker warehousing goods.⁴

Expressions in the Factors Acts. The expressions used in Factors Act varied slightly; in 6 Geo. IV, clause 94, section 2, the term used was "persons entrusted with and in possession of any bill of lading, etc.," and in section 4 "any agent or agents entrusted with goods or to whom the same may be consigned." Section 2 was amended to include persons in possession of the goods themselves.⁵

¹ *E.g.* a clerk, *Lamb v. Attenborough*, (1863) 1 B. & S. 831; person in possession, *Jaulerry v. Britten*, (1838) 4 Bing N. C. 242; servant, caretaker, or bailee for carriage, safe custody, or otherwise; *Heyman v. Flewker*, (1863) 18 C. B. N. S. p. 527; bailees, *Loeschman v. Machin*, (1818) 2 Stark. 311; *Cooper v. Willomat*, (1845) 1 C. B. 672; tenant, *Wood v. Rowcliffe*, (1846) 6 Hare. 183.

² *Heyman v. Flewker*, (1863) 18 C. B. N. S. 519, followed in *Tremoille v. Christie*, (1893) 69

L. T. 338, doubted in *Benj.* 5th p. 31, but *semble* within s. 108.

³ *E.g.* a wharfinger, also a flour factor, *Monk v. Whittenbury*, (1831) 2 B. & Ad. 484; a warehousman and wool broker, *Cole v. N. W. Bank*, (1875) 10 C. P. 364; forwarding agent, *Hellings v. Russell*, (1875) 33 L. T. N. S. 380; *City Bank v. Barrow*, (1880) 5 A. C. 664.

⁴ *Biggs v. Evans*, (1894) 1 Q. B. 18.

⁵ 5 & 6 Vict. c. 39.

These provisions had been construed to mean "factors or agents entrusted as such and ordinarily having as such factor or agent a power of sale or pledge."¹ § 469. English Law.

The courts deliberately read "agent" for "person".²

The early cases chiefly turned on the word "entrusted," but though the words "entrusted for sale" were omitted in 5 & 6 Vict., clause 39, the court held "an agent entrusted with possession of goods" within the meaning of the Act must have been entrusted as such for the purpose of sale.¹

The position of a person hiring goods in England is that he has no power to transfer them; but if he has agreed to buy them,³ and there is no unfulfilled condition precedent to the passing of the property,⁴ he can pass a good title by statute⁵ but not if he has merely an option to buy⁶; and provided he has agreed to buy the goods, he can, though the property has not passed, dispose of them or of the documents of title.⁷ Hirer.

As Benjamin said about these early Acts, no one would venture to give a positive opinion as to their true construction.⁸

Under these Acts several decisions caused dismay in the City of London, such as *Fuentes v. Montis*⁹ in which it was held that a secret revocation of authority made a subsequent sale invalid; so a vendor continuing in possession

¹ *Cole v. N. W. Bank*, (1875) L. R. 10 C. P. 375; *Heyman v. Flewker*, (1868) 13 C. B. N. S. 519.

² *Johnson v. Crédit Lyonnais*, (1877) 3 C. P. D. p. 45; 47 L. J. C. P. 241.

³ *Lec v. Butler*, (1893) 2 Q. B. 318 C. A.; *Hull Rope Works v. Adams*, (1895) 73 L. T. 446; *Thompson v. Veale*, (1896) 74 L. T. 130 C. A.; *Horton v. Gibbins*,

(1897) 18 T. L. R. 408.

⁴ *Weiner v. Gill*, (1904) 2 K. B. 574 C. A.; *Edwards v. Vaughan*, (1910) 26 T. L. R. 545 C. A.

⁵ Sale of Goods Act s. 23.

⁶ *Helby v. Matthews*, (1895) A. C. 471.

⁷ *Cahn v. Pockett*, (1899) 1 Q. B. 643 C. A.

⁸ IV Ed. p. 22.

⁹ (1868) L. R. 4 C. P. 93, 38, L. J. C. P. 95.

of goods sold was held not to be within the Acts,¹ nor a vendee obtaining possession.²

The law was accordingly altered by later enactments.³

**§ 470.
History of
the Section.**

The Law Commissioner's draft section gave power to every possessor of moveable property to confer a good title on a *bona fide* purchaser. The Select Committee⁴ thought the result was to give every bailee for any purpose the power to give a good title, and that India would become a market overt and an asylum for cattle thieves. They accordingly altered the section to its present form. The Contract Act repeals the Indian Factors Acts, the effect of which is stated above.⁵

Exception 1. The meaning of the section, exception (1), is very obscure. It has never been before the Judicial Committee. It seems clear that the words "with the consent of the owner" were intended to prevent thieves or receivers of stolen property from passing a good title; and the words "notwithstanding the instructions to the contrary" were intended to prevent the secret withdrawal of authority from being operative.⁶

As will be seen the Indian Courts have imported more into these phrases. The omission of the words "entrusted" or "mercantile agent" and the substitution of the word "possession" have made the meaning of the exception a most unnecessary problem.

**§ 471.
Indian
decisions.
on
Exception 1.**

Although the Indian cases have not been decided on one or the same canon, all the High Courts have agreed in thinking that mere possession is not sufficient.⁷ The

¹ *Johnson v. Crédit Lyonnais*, (1877) 3 C. P. D. 32.

² *Jenkyns v. Osborne*, (1844) 7 M. & G. 678, 699; *Van Casteele v. Booker*, (1848) 18 L. J. Ex. 9, 2 Ex. 691.

³ Factors Act 1877 and 1889, S. of G. Act 1892.

⁴ Report, para. 7.

⁵ See § 469.

⁶ That is to reverse cases like *Fuentes v. Montis*, (1868) 38 L. J. C. P. 95.

⁷ Per Bachelor J. reviewing the cases in *Mandall v. Bank of Bombay*, (1910) 12 Bom. L. R. 316 and see the reversed judgment of Beaman, J., which criticises in detail the previous decisions, (1909) 9 Bom. L. R. 926.

general view is that it means the possession of a mercantile agent or factor, but as this practically means reading the repealed Factors Acts into the section, the decisions have been couched in dubious language.

§ 471.

The section has been considered in many cases. It has been held that section 108 is in part substituted for and in *pari materia* with the Factors Acts XIII of 1840 and XX of 1844, which are repealed by the present Act, and which extended to British India the provisions of the several Factors Acts, 4 Geo. IV, clause 83, as amended by 6 Geo. IV, clause 94, and 5 & 6 Vict., clause 39.¹

These Acts created statutory exceptions to the general rule in the case of agents entrusted with certain mercantile documents.²

The section is wider than the old Factors Acts³ and than the present law in England, and therefore English decisions⁴ are of little use in India.

Wider than former law.

Crouch, C. J., who considered the section must be construed without reference to English law, held⁵ that "the last words of the exception appear to show that the possession which is meant by the first part of the exception is a possession which is unqualified, and not to be restricted otherwise than by the owner giving instructions to the person who has it. It is the kind of possession which a factor or agent has,⁶ when the owner of the goods, although he has parted with the possession, may give instructions to the person in possession what to do with the goods. In such a case it seems to have been intended

Kind of possession of a factor or Agent.

¹ See *G. I. P. v. Hanmandas*, (1889) 14 Bom. 57 C. A.

Chettiar, (1903) 14 M. L. J. 69 (bench), 27 M. 424.

² *LeGeyt v. Harvey*, (1884) 8 B. 501.

⁵ *Greenwood v. Holquittle*, (1873) 12 B.L.R. 42 C.A. (hire-purchaser with option to buy) approved in *Biddomaye Dabu v. Selltaram*, (1878) 4 C. 497.

³ And it may be added in some respects that the present one: Factors Act of 1889, 52 & 53 Vict. c. 45, S. of G. Act s. 25.

⁶ See *Naganda Davey v. Bappu*, (1903) 27 M. 424.

⁴ *Naganada Davey v. Bappu*

§ 471.

Hirer's
possession.
Possession
for specific
purpose.

that the person selling contrary to his instructions should give a title to the buyer, if the buyer acted in good faith. We think the exception does not apply where there is only a qualified possession such as a hirer of goods has, or where the possession is for a specific purpose."¹

Entirely
beyond
owner's
control.

This decision has been consistently followed; in 1884 it was approved by the Bombay High Court,² when Sargent, C. J., ruled that "section 108 is doubtless very general and the omission of the expressions 'agent' and 'entrusted with' used in the repealed Factors Acts doubtless gives the section a larger scope than these Acts possessed as construed by the Courts in England. We think, however, it would be straining the expression 'by consent' of the owner beyond its plain meaning if it were held applicable to cases where the possession is entirely beyond the control of the owner of the goods." The learned Judge then cited the passage quoted from *Greenwood v. Holquette*³ with approval and held that the new English Acts extending the operation of the old Acts to the case of a purchaser in possession of documents of title to goods, did not apply to India, and accordingly a purchaser did not lose his lien for the price of goods sold by the transfer of a delivery order by a sub-buyer to another buyer.⁴

Not mere
detention.

In 1897 it was held⁵ that possession by the consent of the owner in section 108 is far from extending to every case of detention of chattels with the owner's consent.⁶ The exception has particular relation to the cases of persons allowed by owners to have the *indicia* of property or possession under such circumstances as may naturally

¹ See *Naganda Davey v. Bappu*, (1903) 27 M. 424.

² *LeGeyt v. Harvey*, (1884) 3 B. 501 C.A. (purchaser's possession).

³ *Greenwood v. Holquette*, (1878) 12 B.L.R. 42 C.A. (hire-purchaser with option to buy) approved in *Biddomaye Dabu v. Settaram*, (1878) 4 C. 497.

⁴ See § 477.

⁵ *Shankar v. Mohanlal*, (1887) 11 B. 704 (gratuitous bailee).

⁶ The Court cited *Lotan v. Cross* as showing that in the case of a gratuitous bailment of a chattel, the possession remains constructively with the owner.

induce others to regard them as owners and constituting some degree of negligence or defect of precaution imputable to the true owners. It does not mean a limited possession as that of a gratuitous bailee.¹

§ 471.
Some negligence.

Gratuitous bailee.

In the same way the meaning of the word "possession" in section 178 has been construed to be the same as in section 108, exception 1.² A servant has been held not to have possession sufficient to support a pledge, but only the bare custody of goods left in his possession.³ A wife was held not to be empowered to pledge her husband's jewels which she was allowed to wear.⁴ A hirer⁵ and a warehouseman have been held not to have the requisite possession.⁶

§ 472.
Possession under section 178.

Servant.

Wife.

Hirer.

The effect of the above cited decisions⁶ is to limit the apparent meaning of the section, and it is open to doubt whether the Privy Council would support such a view : the fact was that the Judges found the section unexpectedly wide and construed it as meaning not what it said but what the previous repealed legislation had said, and were doubtless fortified by the view which the select committees took of their own drafting. One decision stands out in opposition to the current of Indian authorities ; the Chief Court of the Punjab in *Framji v. McGregor*,⁷ where a buyer having left horses after sale to be exercised by the seller, a horse dealer, was held not to be entitled to recover them from a creditor of the seller's, to whom they had been transferred in satisfaction of a debt. Pollock blames the reporters for perpetuating such a decision.⁸

§ 473.
Effect of the decisions.

Meaning of possession.

¹ Cf. *Naganda Davey v. Bappu*, (1903) 27 M. 424.

24 B. 458

² *Mandlall v. Bank of Bombay*, (1910) 12 Bom. L. R. 316, where all the cases are reviewed.

⁵ *Naganda Davey v. Bappu*, (1903) 27 M. 424, 14 M. L. J. 69.

³ *Biddomoye Dubee v. Sittaram*, (1878) 4 C. 497; see also *Shankar v. Mohanlal*, (1887) 11 B. 704.

⁶ Elaborately reviewed by Batchelor J. in *Mandlall v. Bank of Bombay*, (1910) 12 Bom. L. R. 316 C. A.

⁷ (190) Punj. Rec. No. 27.

⁴ *Seager v. Hukma Kissa*, (1900)

⁸ 2nd Ed. 415.

§ 473. Under the old English Factors Acts, the case¹ would have been decided on the ground that the dealer was entrusted not as a dealer but for a specific purpose,² but section 108 uses the words notwithstanding the owner's instructions to the contrary which seem to cover the case.³

Possession
for a special
purpose.

There is also a judgment of Beaman, J.,⁴ which reviews all the authorities and dissents from the *ratio decidendi* of them all; he makes the suggestion that possession under sections 108 and 178, means the kind of possession to which the law attaches possessory remedies. There is everything in favour of this view except the previous decisions, and his judgment was overruled relying on them. But *semble* the judgment is the soundest exposition of an exception which is perhaps an answerless puzzle, and it is quite probable that the Privy Council would endorse it.

§ 474.
English
construc-
tion of
"consent."

Obtains with
consent.

It is to be noticed that similar terms used in section 9 of the Factors Act of 1889 and reproduced in section 25 of the Sale of Goods Act, namely "obtains with the consent of the seller possession of goods or documents of title to goods," which refer to a buyer or a person who has agreed to buy goods, have had a different construction placed upon them from that adopted in India. It was held in *Cahn v. Pockett*⁵ the words "obtain with consent" in section 25 are wider than "entrust" and at least exclude all consideration of the conditions upon or purposes for which actual possession was in fact voluntarily given. It was further held that the purchaser must take the risk of his vendor having found or stolen the goods or documents,

¹ *Framji v. McGregor*, (1902) Punj. Rep. No. 27.

² A distinction which was adopted in *Mandlall v. Bank of Bombay*, (1910) 12 Bom. L.R. 316, where a warehouseman was also a merchant; see *Greenwood v. Holquette*, (1876) 12 B.L.R. p. 46.

³ See *Cahn v. Pocketts*, (1899) 1 Q.B. p. 661.

⁴ *Mandlall v. Bank of Bombay*, (1909) 11 Bom. L.R. 926 reversed (1910) 12 Bom. L.R. 316.

⁵ (1899) 1 Q.B. p. 661 C.A., approved in *Oppenheimer v. Frazer*, (1907) 2 K.B. 71 C.A.

or otherwise got possession of them without the consent of the owner. But if ¹ possession is obtained by the consent of the owner although it were under a contract voidable as fraudulent, the possessor can pass a good title, however fraudulent the person in actual custody may have been in obtaining possession provided it did not amount to larceny by a trick, and however grossly he may abuse confidence reposed in him, or violate the mandate under which he got possession he can give a good title,"² and where a buyer after sale had the goods transferred to his own name in the warehouseman's books and obtained warrants from him for them, which he pledged, it was held by the House of Lords ³ that the buyer was not within section of the Factors Act of 1889, as he did not obtain the documents of title from the sellers or with their consent. He got them in his own right and in his own name as owner directly from the warehouseman.⁴ Lord Herschell said possession of the documents was obtained by virtue of his ownership of the goods ⁵ and cannot properly be said to have been obtained with the consent of the seller. Accordingly the seller was held entitled to recover the goods from an innocent third party to whom the buyer had pledged them.

§ 474.

Meaning of consent.

Inglis v. Robertson.

It would follow from the *ratio decidendi* of the Indian cases,⁶ that the Courts would recognise the rule established under the old Factors' Acts,⁷ that if a person is in possession in some other capacity than that which the section is held to require, he is not within the section,⁷ as

§ 475.
Person in possession in some other capacity.

¹ Omitting the classes of persons to whom this refers in England.

² *Cahn v. Pockett*, (1899) 1 Q. B. p. 659 C.A.

³ *Inglis v. Robertson*, (1896) A. C. 616.

⁴ *Ibid*, per Lord Watson.

⁵ So a buyer who was given a delivery order by a seller was

held not to be in possession with the consent of the seller, but as owner: *Jenkins v. Usborne*, (1844) 7 M. & Gr. 678; see *Van Casteel v. Booker*, (1848) 2 Ex. 691.

⁶ But see *Framji v. McGregor*, (1902) Pun. Rep. No. 27.

⁷ *City Bank v. Burrow*, (1880) 5 A. C. 664; *Cole v. N.W. Bank*, (1875) L. R. 10 C. P. 354; cf. *Biggs v. Evans*, (1894) 1 Q. B. 88.

§ 475. Blackburn J. puts it, an auctioneer who hires a furnished house cannot be intended to be thereby enabled to sell the furniture so as to pass a good title.¹ This distinction seems to have been approved in a Bombay case where a warehouseman who was also a factor received goods as a warehouseman and pledged them; no suggestion was made that he could do so as a mercantile agent.² The section does not apply when the possession is for a specific purpose.³

Possession in some other capacity.

Goods supplied on approbation.

Clerk.

Where goods were supplied on approbation on sale for cash only or return, the property to remain with the owner, it was held that he could recover the goods though pledged with an innocent third party,⁴ *sed quare* whether this would apply to India, but the above-quoted decisions would cover this case. It has also been held that a clerk has no apparent authority to sell and can give no title. His employers can recover goods sold by a clerk if they have not held him out as their agent to sell.⁵

§ 476. Where consent has been withdrawn.

Where consent has been withdrawn.

When the Contract Act was passed the English rule was that a mercantile agent, whose authority had been secretly withdrawn and from whom the owner had demanded a return of the goods was not a person entrusted and in possession within the meaning of the then Factors Acts.⁶ There has been no decision as to what the legislature intended on this point, and the

¹ *Cole v. N. W. Bank*, (1875) L. R. 10 C. P. p. 373.

² *Mandlall v. Bank of Bombay*, (1910) 12 Bom. L. R. 316.

³ *Greenwood v. Holquette*, (1878) 12 B. L. R. p. 46. But if the specific purpose is to sell, the case would come with illustration b. The English law is different, see cases cited in *n. 4, infra*.

⁴ *Weiner v. Gill*, (1904) 2 K.B. 574 (1905) 2 K. B. 172, followed in *Edwards v. Vaughan*, (1910)

26 T.L.R. 545; where it was held that the person in possession is not a buyer; no estoppel arises in such cases: *Truman v. Allenborough*, (1910) 26 T. L. R. 601.

⁵ *Farquharson v. King*, (1902) A. C. 325 H. of L.

⁶ *Fuentes v. Montis*, (1868) L.R. 3 C. P. 268 affirmed L. R. 4 C. P. 93; the law was subsequently altered, Factors Act 1877, s. 2, 1889 s. 2. (2).

wording of the section is far from lucid. It seems that "notwithstanding any instructions to the contrary" mean that withdrawal of any authority to sell would not affect the buyer's title, and section 208 shows that this is so in the case of agents unless the buyer knew thereof.¹ But what the position is if the owner withdraws his consent to the possession, is not clear. The drafting of the Factors Act² shows what is required to alter the law. It seems, however, that as long as the possession continues a valid title can be given, for the wording is "by the consent" and not "with the consent."

But the wording "is, by consent, in possession" might be construed to mean that the person must be and not have been in possession by consent. The wording of the Sale of Goods Act, section 25, sub-section 2, "obtains with the consent," has been construed to mean that it is immaterial if the consent is afterwards withdrawn.³ But the English sections and their construction are not safe guides.

It seems that the owner might expressly make the performance of an act a condition precedent to his consent to possession, that is, a seller sending a bill of lading and a bill of exchange to a buyer might, though the transaction of itself implies no such condition, make acceptance of the bill of exchange a condition precedent to his consent to possession of the bill of lading.⁴ Had

§ 476.

When consent has been withdrawn.

Conditional consent.

¹ But authorised agents and factors entrusted with goods were not on the same footing on this point at Common Law, *Fuentes v. Montis*, (1868) L. R. 4 C. P. 93, where *Trueman v. Loder*, (1840) 11 A. & E. 589 was cited in argument.

² See Factors Act 1889 s. 2 (2) "has, with the consent of the owner, been in possession."

³ *Cahn v. Pockett*, (1889) 1 Q.B. p. 658, but see p. 456 *infra*.

⁴ *Cahn v. Pockett*, (1889) 1 Q.B. p. 666 *per* Romer L. J. See *Merchant Banking Co. v. Phoenix*, (1876) L. R. 5 Ch. D. p. 219: *cf.* cases of persons in possession under a sale or return agreement, the property not to pass until payment: *Truman v. Attenborough*, (1910) 6 T. L. R. 601; *Edwards v. Vaughan*, (1910) 26 T. L. R. 545. But this would not apply to cases of stoppage in transit where consent apart from fraud is not required; see *G. I. P. v. Hanmandas*, (1889) 14 B. p. 62.

the buyer in *Juggernaut Agarwallah v. Smith*¹ sold the bill of lading it seems that the contract made his possession of the mate's receipts conditional on payment and there was no consent to possession without payment.¹

**§ 477.
Disposition of
buyers.**

As to whether a buyer in possession of documents of title relating to goods sold to him, can by transferring them defeat the unpaid seller's rights and pass a good title free of such rights is not clear.

The buyer, if the property has passed, is the owner of the goods, and can transfer his ownership without either possessing the goods or the documents of title, but apart from sections 102, 103, 108 and 98, he can only transfer his interest subject to the rights of an unpaid seller, and as the exception only gives power to transfer the ownership so as to pass a good title, there seems to be no principle for construing it as if it read, "can pass a good title free from any lien or charge." If the property has not passed the buyer can under the general law assign a contract subject to the seller's rights and even if possession of the goods or documents of title gave him, under exception 1, a power to transfer the ownership, there is nothing to indicate that such ownership would be free from the unpaid seller's rights.

Sargent, C.J.,² held that apart from custom,³ a purchaser could not by transferring a delivery order defeat the seller's lien. The report does not give the form of the order, but as the decision turned on section 108 apparently it showed title to the goods.

The same learned Judge also held that a buyer in possession of documents of title within the meaning of section 108, exception 1, but not within the meaning of the

¹ (1904) 33 C. 547, 34 C. 178 (a case of pledge and of dubious authority).

² *LeGeyt v. Harvey*, (1884) 8 B. 501.

³ *Anglo-India Jute Mills v. Omdemull*. (1910) 38 C. 127, and see *Juggernaut Agarwallah v. Smith*, (1906) 33 C. 547, (1907) 34 C. 178 (a case of pledge of a bill of lading).

same words in section 102, could not by transferring such defeat the right to stop.¹

§ 477.

Position of a buyer.

The Calcutta Appeal Court seem to have been of a different opinion.² Where a buyer sold a delivery order, Jenkins, C.J., said that under section 108 the transferee of a document of title acquires a title to the goods to which it relates. The decision turned on questions of custom and estoppel, and section 108 was said not to apply as the delivery order related to unascertained goods.³ It seems clear, however, that the Court considered a buyer within the exception. The point was not taken in argument and the rulings of Sargent, C.J., were not cited. But if the limitation of the meaning to be ascribed to possession according to *Greenwood v. Holquette*,⁴ that it must be such that the owner may give instructions to the possessor, is sound, it seems that a buyer is not within the exception. In that case⁴ a hirer with an option to buy was held not to have possession within the meaning of the section.⁵

In an earlier Calcutta case⁶ the view taken was that the transfer of a delivery order to give a good title required the seller's assent, but the form of the order is not given and the question whether it was a document showing title to goods was not raised. In that case the buyer after obtaining delivery orders requested the

¹ *G. I. P. v. Hanmandas*, (1889) 14 B. 57, but see § 417.

² *Anglo-India Jute Mills v. Omademull*, (1910) 38 C. 127, and see *Juggernaut Agarwallah v. Smith*, (1906) 33 C 547, (1907) 34 C. 173 (a case of pledge of a bill of lading).

³ See § 484.

⁴ (1873) 12 B.L.R. 42.

⁵ Cited in *Nagandra Davay v. Bappu*, (1903) 27 M. 424, for the proposition that possession under a hire purchase agreement is not

enough, without regard to the distinction drawn in England between cases where the hirer has agreed to buy, and has only an option to buy; in the latter case he is not a "buyer" within s. 9 of the Factors Act of 1889; *Helby v. Matthews*, (1895) A.C. 471 H.L.; *Lee v. Butler*, (1893) 2 Q.B. 318; *Hull Ropes Co. v. Adams*, (1895) 65 L.J. Q.B. 114.

⁶ *Ganges Manufacturing Co. v. Sourugmull*, (1880) 5 C. 669.

§ 477. unpaid sellers to give a note authorising a third party to receive delivery and the sellers gave it. The Courts accordingly held that the sellers were estopped from setting up their lien as the third party advanced money on the faith of their note. It seems then that the delivery orders showed title to the goods, for if they showed that the price had to be paid, no inference of waiver of lien could have arisen.

Position of
a Buyer.

There is also the case of *Juggernaut Agarwallah v. Smith*,¹ where a seller sent mate's receipts obtained in the buyer's name to the buyer for inspection only. The buyer without paying for the goods exchanged the mate's receipts for bills of lading² and pledged them. It was not suggested that a buyer was not within section 178. The view taken was that the property had passed to him and that the pledge was as owner; in which view the point did not arise, as the contract was voidable only within exception 3.

Law before
the Act.

No power to
defeat seller's
rights.

When the Contract Act was passed the law in England was that a disposition by a buyer in possession of documents of title other than bills of lading did not defeat the seller's rights, because he was not intrusted as an agent³ but held them in his own right.⁴ The law was altered in 1877.⁵

Except under
a voidable
contract.

The only cases in which a buyer could give a title good against the seller's rights was when he had obtained the property in goods under a voidable contract: this was the Common Law⁶ and is now enacted by section 23 of

¹ (1906) 33 C. 547, 34 C. 173.

² See para. 479.

³ See *Cole v. N. W. Bank*, (1875) L. R. 10 C. P. p. 373; *McEwan v. Smith*, (1849) 2 H. L. C. 309; cf. *Merchant Banking Co. v. Phoenix*, (1877) 5 Ch. D. 205.

⁴ *Jenkyns v. Osborne*, (1844) 7 M. & Gr. 668; *Van Casteel v.*

Booker, (1848) 2 Ex. 691; *Fuentes v. Montis*, (1868) L.R. 3 C.P. 268, and see *Inglis v. Robertson*, (1898) A. C. 629 set out in para. 474.

⁵ Now see s. 9 Factors Act (1889) reproduced in s. 25 (2) of the S. of G. Act.

⁶ *Cundy v. Lindsay*, (1878) 3 A. C. p. 464.

the Sale of Goods Act. He could also defeat the seller's right to stop by dealing with a bill of lading. § 477.

These cases are specially provided for by the Contract Act which does not repeal the Bills of Lading Act of 1856 under which a bill of lading is transferable by endorsement and the property in the goods to which it relates pass by endorsement to the endorsee. Under section 102 a buyer can defeat the seller's right to stop by assigning a document of title¹ to a *bonâ fide* buyer who gives value therefor. The very presence of that section² in its unqualified form seems intended to differentiate the position of a buyer from a person in possession under exception 1 of section 108. A similar argument with respect to section 47 of the Sale of Goods Act failed because that section is expressly made subject to the other provisions of that Act.³ Section 98 on the face of it shows that a seller's lien is not defeated by the buyer transferring documents of title,⁴ but that may be merely inaccurate drafting.⁵

Contract Act gives certain powers.

Exception 3 covers the case of a buyer in possession of goods under a voidable contract and preserves to a certain extent the Common Law exception to the general rule. Possession under voidable title.

It would seem then that the Legislature did not intend to alter the previous law and the view taken by Sargent C. J., is correct.

¹ Held by Sargent C. J. not to mean the same as in s. 108 : *G.I.P. v. Hanmandas*, (1889) 14 B. 57.

² In the original draft only "bills of lading" were mentioned. "Other documents of title" were added by the Indian Legislative Department. The section requires a transfer of the document which is unnecessary under s. 108, Ex. 1, see further under s. 102.

³ *Cahn v. Pockett*, (1898) 2 Q.

B. 61 on appeal, (1899) 1 Q. B. 654.

⁴ Fletcher, J., however did not take this view, *Anglo-India Jute Mill Co. v. Omademull*, (1910) 88 C. p. 132, but the point was never raised, in fact it was assumed in argument that s. 108 applied to buyers.

⁵ Compare s. 47 of the S. of G. Act.

§ 477. At any rate, if the buyer obtains documents of title as owner, it seems that such possession is not with the seller's consent¹ and he can only pass a title subject to the unpaid seller's rights. But if he obtains a bill of lading unconditionally endorsed in blank or to him the seller's lien must have ceased, and sections 102 and 103 apply.

§ 478.
Disposi-
tions by
sellers.

In England it was the law previous to the Indian Contract Act that if a buyer for his own convenience left the goods and documents of title in the hands of the seller who fraudulently re-sold or pledged them, he could nevertheless recover the goods from an innocent purchaser or pledgee unless a case of estoppel arose.² It was clearly established that the mere fact that a buyer after payment left with the seller the documents of title raised no estoppel.³ The law was subsequently altered in England.³ The Factors Act of 1877 only referred to the case of documents of title.

Under the English sections there is no question as to the possession being with the consent of the buyer.³ It seems that the seller retaining goods in which the property has passed or the documents of title thereto, is not within exception 1.⁴ There is no decision on the point,⁵ but, generally speaking, a seller is not *qua* seller in possession with the buyer's consent.

§ 479.
Derivative
documents.

Where a person had obtained possession of any document of title to goods by reason of his being or having been with the consent of the owner in possession of the goods represented thereby, or of any other document of

¹ *Inglis v. Robertson*, (1898) A. C. 616 H. of L. Sc.

² *Johnson v. Crédit Lyonnais*, (1877) 3 C. P. D. 32, 40.

³ Factors Act 1877 s. 8, 1889 s. 8; S. of G. Act s. 25 (1); see *Nicholson v. Harper*, (1895) 2 Ch. 415, 73 L. T. 19.

⁴ *Cunningham and Shepperd*

10th Ed. p. 328, take the view that both buyers and sellers are within the exception. Pollock does not express an opinion.

⁵ *Framji v. McGregor*, (1902) Punj. Rep. No. 27 was a case of a seller left in possession as a trainer.

title to the goods, under the earlier Factors Acts he was held not to be entrusted with such documents. For a distinction was drawn between enabling a person to obtain documents and "entrusting him with them."^{1,2}

§ 479.

Derivative documents.

This was altered by section 4 of the Factors Act of 1842,³ which was intended to alter the law as laid down in *Phillips v. Huth*¹ and *Hatfield v. Phillips*.²

The Factors Act of 1842 was extended to India by Act XX of 1844, and that Act is repealed by the Contract Act; the omission, therefore, of any provision as in that Act seems deliberate.⁴ It seems then that unless derivative documents are obtained by the consent of the owner, not merely through the possession of the goods or other documents, the section does not apply. For possession of documents the very creation of which is a breach of trust is not by the consent of the owner.⁵

Under exception 1 it is only a buyer from a person in possession who can obtain a good title. Section 178 provides for the case of pledgees.

§ 480.

Only a buyer obtains a good title.

A delivery or transfer under an assignment of the benefit of creditors is not within the English Acts according to an opinion expressed in *Kitto v. Bilbie*,⁶ but *quaere*, are the creditors buyers within section 108, exception 1.

Assignment for benefit of creditors.

Apparently an exchange of goods or documents of title for goods or documents of title between an innocent third party and a non-owner would be protected under this exception read with section 120 of the Transfer of Property Act.

Exchanges.

The use of the word 'consent' in this exception seems to be intended to mean any consent amounting to consent in

§ 481.

Consent.

¹ (1840) 6 M. & W., 572.

² (1842) 9 M. & W. 647, 11 L. J. Ex. 425; on appeal 14 M. & W. 665 in H. of L. 12 Cl. & F. 343.

³ See new Factors Act, 1889, s. 2(3).

⁴ But in *Juggernath Agarwallah v. Smith*, (1906) 33 C. 547, 84 C. 173 C.A., it was held that a buyer

intrusted with mate's receipts, who thereby obtained bills of lading, could pledge the bills of lading. This point, however, was not taken.

⁵ *Hatfield v. Huth*, (1842) 12 Cl. & F. 343

⁶ (1895) 72 L. T. 266, Vaughan Williams J.

§ 481.
Consent.

the eye of the law¹ and to be contrasted with "free consent" as defined in section 14 of the Act.

The third exception refers to cases of voidable contracts and under such the buyer may obtain the goods as owner or with the consent of the seller, which consent would not be free as defined by section 14, for otherwise the contract would not be voidable. The omission of the word 'consent' in the exception may have been intended to differentiate between 'consent' which is not free, and 'consent' in exception 1, but probably was intended to distinguish cases decided on the ground that the possession was as owner and not with the consent of the seller.

**Consent
subsequent
to disposi-
tion.**

Even though a person originally obtained possession without the owner's consent and effected a sale or pledge, yet if he subsequently obtains the owner's consent that will enure for the benefit of the buyer or pledgee and render the disposition valid.²

¹ *Oppenheimer v. Frazer*, (1907) 2 K.B., p. 70, "consent means what the law recognises as consent"; and see para. 480; and, for cases of obtaining possession as owner, see para. 474.

² *Whitehorn v. Davidson*, (1911) 80 L. J. K. B. p. 438, 436; (1910) 1 K. B. 468 C. A., where a person in possession of goods by fraud amounting to false pretences, i.e. a thief, pledged goods and subsequently induced the true owner to agree to sell them by a fraud which rendered the contract voidable. A contrary view was taken in *Truman v. Attenborough*, (1910) 26 T. L. R. 601 which was not cited in the C.A., where a possessor under a sale or return agreement, no property to pass till payment, fraudulently pledged goods to a *bona fide* pledgee, and subsequently induced the true owner to sell them to him under a contract voidable for fraud. It was held that the pledgee had no

charge for his pledge, though he had for a pledge subsequent to the voidable contract. But this case must be considered as overruled and in India the principle is clear from s. 48 of the Transfer of Property Act and s. 18 (a) of the Specific Relief Act. It was recently held that when a pledgor pledged as owner, an innocent pledgee could not set up against the true owner that the pledgor could have pledged as executor: *Soloman v. Attenborough*, (1911) 1 Ch. 451 C.A. But it seems this would not be sound in India if in England for there seems to be no distinction between the right to set up subsequent title and a subsisting though undisclosed one; see *Re Morgan* 18 Ch. D. 93, 103, where the dicta at p. 98, *ibid.* were not approved; *Re Venn* (1894) 2 Ch 101, 114. *Corser v. Cartwright*, (1875) L. R. 7 H. L. 731. But see *Pura Sundari Dasi v. Bijraj Nopani*, (1910) 87 C. 362.

In England, where the plaintiff sold wine to *T*, cash on delivery, and *T* agreed to pay rent for the cellar of a third party in which the plaintiff had stored the goods, it was held that even if *T* had taken over the lease of the cellar, that he was not in possession of the wine with the consent of the seller, for he might have possession of the cellar but not of the wine.¹ § 481.

As possession is presumptive evidence of ownership under section 110 of Evidence Act, the onus of proving that there was no consent is on the party asserting that there was none.² Onus of proving consent.

If documents of title are obtained without the original seller's consent, their possession gives no title against the seller. Where sellers took a receipt for goods delivered on board in their own name, and the purchaser re-sold, and received payment, and then became insolvent without paying the price, and the sub-buyer obtained a bill of lading without the assent of the original sellers, it was held that he had acquired no rights against the first sellers, who had never delivered the property out of their control.³ § 482. Documents of title obtained without consent.

Under the section exception 1, the title is given by transferring the ownership; there is nothing about delivering the goods or transferring the documents⁴ as in section 25 of the Sale of Goods Act. There was no such provision under the earlier Factors Acts,⁵ and it seems any executed sale is sufficient. In England all dispositions to defeat the right of the owner must be for value⁶ and this was so under the earlier Acts extended to India.⁷ Section 108 first refers to transfers of ownership which might be § 483. How title can be given.

¹ *Robinson v. Restell*, (1896) 12 T. L. R. 174. *man v. Carbutt*, (1889) 61 L. T. 281.

² See *Stokes v. Soondernath* (1891) 22 B. p. 548.

³ *Craven v. Ryder*, (1816) 6 Taunt 437; *Oppenheimer v. Fraser*, (1907) 2 K. B. 50 C.A.; see *Gill-*

⁴ As under ss. 102 and 103.

⁵ Benj. 5th Ed. 36.

⁶ Factors Act, (1889) s. 5.

⁷ Of 1842, s. 4, 2.

§ 483. by gift, but the proviso speaks of the person in possession selling the goods or documents, and only a buyer can obtain a good title in such a case.

Charge. A mere charge on the goods or documents not amounting to a pledge under section 178 would be ineffective,¹ so would the execution of a deed of assignment.²

As there is nothing equivalent to other disposition, it seems an attachment by a mortgagee would not affect the owner under exception 1.³

Sale before documents arrive. If a sale is effected before the seller obtains a document of title, a subsequent transfer of such a document is effective.⁴ The buyer's title depends on the transfer thereof and not on the sale.⁵

Where goods wrongfully delivered prior to pledge. A pledge of a bill of lading after the goods have been wrongfully delivered by the bailee is valid.⁶

Where seller's title to pledge accrued after the pledge. Where a pledge was made by a person who had obtained goods by a trick, but to whom the owner subsequently in ignorance of the trick sold the goods, the title thus obtained although the contract was voidable for fraud was held to enure for the benefit of the pledgee and to give him a valid title to the goods.⁷

§ 484. Documents must show title. The documents of title, if section 108 is to apply, must show title to the goods as is clearly shown by illustration (c). And documents of title, endorsed subject to a condition, will not be within the section, unless the condition is complied with.⁸

A document of title is something which represents goods and from which either immediately or at some future time the possession of the goods may be obtained.⁹

¹ *Nicholson v. Harper*, (1895) 2 Ch. 415. B. p. 664.

² Cf. *Kitto v. Bilbie*, (1895) 72 L. T. 266; see *ante* para. 480. ⁶ *Bristol Bank v. Midland Ry.*, (1891) 2 Q. B., 653.

³ See *Hull Rope Works v. Adams*, (1895) 73 L. T. 416. ⁷ *Whitehorn v. Davidson*, (1911) 1 K.B. 463 C.A.; see *ante* p. 442 n. 2.

⁴ *Cole v. N.W. Bank*, (1875) L. R. 10 C.P. p. 374. ⁸ See § 207.

⁵ *Cahn v. Pockett*, (1899) 1 Q. R. 10 Ch. 491. ⁹ *Gunn v. Bolckow*, (1875) L. R. 10 Ch. 491.

It was held in England that a document of title need not on the face ¹ of it show that it could be transferred by endorsement,² but it must not be restrictively endorsed, *i.e.*, if endorsed 'deliver to *A* on account of *B*,' a pledgee from *A* would have notice that *A* only had a limited right of dealing with the document.³ § 484.

In the recent case of the *Anglo-India Jute Mills v. Omademull*,³ it was held by Fletcher, J., that such documents must refer to ascertained goods. But in England the House of Lords in a Scotch appeal,³ which turned on section 1(4)⁴ the Factors Act of 1842, rejected the argument that the Factors Acts only related to actually specified goods, and held that a delivery order⁵ for goods stored in bulk was a document of title. It was suggested that if it related to goods to be specially manufactured for the contract it might be different.⁶ But it was immaterial that the goods were not separated from the bulk for, on presentation of the order, they would have been forthcoming. The argument used was that the order was not for the sale of goods to which it related.⁷ Under exception 1 documents must relate to goods, and this was not expressly so under the Factors Acts. The point is therefore not clear; and it is to be noticed that in the Calcutta

And relate to ascertained goods.

¹ For the case of a bill of lading endorsed specially without 'to order or assigns,' see § 420.

² *Vickers v. Hertz*, (1871) L. R. 2 H.L. Sc. 113, L.R. 2 Sc. Ap. 113.

³ (1910) 38 C. 127 C. A. The same view was evidently taken in *Ganges Manufacturing Co. v. Souragmull*, (1880) 5 C. 689 C. A., where the seller was on other grounds held estopped from setting up that the goods were not appropriated.

⁴ Reproduced in Act of 1889: it refers to documents used in the ordinary course of business as proof of possession or control of goods.

⁵ It was strictly speaking a warrant, just as in the Calcutta case.

⁶ *Ibid.* p. 116.

⁷ The point argued in Ex. parte *Falk*, (1880) 14 Ch. D. 446 C. A., but not noticed by the Court, or in the H. of L. (1882) 7 A. C. 578.

§ 484. case¹ Jenkins, C.J., avoided deciding the point. But there may be questions of trade usage and estoppel.¹

Where no goods.

If there are no goods at all to which the documents relate, their transfer is nugatory,² apart from estoppel.¹ But a pledgee of a bill of lading whose title accrued after wrongful delivery of the goods, was held to be entitled to sue for the goods.³

§ 485.
Documents of title.

The Code refers to documents of title in sections 102, 103, 108 and 178, and it would seem *prima facie* that the phrases used amount to the same thing under all these sections. The Sale of Goods Act supports this view, and the variations in phraseology in the Code appear to be a mere idiosyncrasy of draftsmanship.⁴ Sargent, C.J.,⁵ however took a different view.

In England under section 1 (4) of the Factors Act of 1889, all documents to be documents of title must be used in the ordinary course of business as proof of the possession or control of goods or authorising or purporting to authorise either by endorsement or delivery the possessor of the document to transfer or receive goods thereby represented.⁶ This definition was borrowed from section 4 of the Act of 1842, which was extended to India by Act XX of 1844, and is repealed by the Code. The omission therefore of the qualification is deliberate. But the document must show title to goods. The same documents are enumerated in section 108 of the Code as in section

¹ *Anglo-India Jule Mills v. Omademull*, (1910) 38 C 147, and see § 467.

² *Bryans v. Nix*, (1839) 8 L J. Ex. 137; *J. C. Shaw v. Bill*, (1884) 8 M. 38.

³ *Bristol Bank v. Midland Ry.*, (1891) 2 Q. B. 653; *Short v. Simpson*, (1866) L. R. I. C.P. 248.

⁴ Though variation in expression in a statute ordinarily indi-

cates a difference of meaning, *Parshotam Vallu v. Bai Punji*, (1902) 4 Bom. L. R. 817.

⁵ *G. I. P. v. Hanmandis*, (1889) 14 B. 57, see ante note to section 102.

⁶ *Farina v. Hume*, (1846) 16 M. & W. 119, or such a document; and *Gunn v. Bolckow*, (1875) 10 Oh. 421 for an instrument not complying with these requisites.

1 (4) of the Factors Act 1889 with the addition of a § 465.
Wharfinger's certificate. The Act of 1842 omitted the term warehousekeeper's certificate, which was included in the Act of 1825, and it was held in England that such a document was not within the Act of 1842.¹

It would seem² that a railway receipt is such a document having regard to the terms of the section and section 137 of the Transfer of Property Act, in which such is included among mercantile documents of title to goods.³ And it has been so held, but the form of the receipt is material.⁴ As was pointed out in *LeGeyl's* case⁴ the mere giving of a delivery order or railway receipt does not defeat the seller's lien⁵; the person in possession must attorn: this would apply to most railway receipts.³ Railway receipt.

A delivery order is "an order from the vendor to the warehouseman to deliver the goods to the vendee,"⁶ and must be distinguished from a warrant which is a document issued by the bailee himself. Delivery order.

Cash receipts are not documents of title.⁷ Bleacher's receipts have been held to be documents of title in England.⁸ Cash receipts.

Mate's receipts are not documents of title.⁹ There is no difference between them and any other chose in action Mate's receipts.

¹ *Gunn v. Bolckow*, (1878) L.R. 501.
10 Ch. 491.

² This is Pollock's view, 2nd Ed., p. 418

³ But see *Jettmull v. B.B. Ry.*, (1901) 3 Bom. L. R. 260, where it was held that a railway receipt, whether a document of title or not, estopped the Railway. Evidence of a Bombay custom to treat such as documents of title was given. But this ruling as to estoppel is unsound; see § 467 as to the effect of a bailee issuing documents.

⁴ *LeGeyl v. Harvey*, (1884) 8 B.

⁵ See s. 90 illus. (c), 95, 98.

⁶ *Morgan v. Gath*, (1865) 3, H. & C. 748; see *Ex parte Close*, (1885) 54 L.J.Q.B. 43; *Re Cunningham*, (1185) 542 J. Ch 44; *Union Credit Bank v. Mersey Docks*, L. C. (1899) 2 Q.B. 205 (blank filled in.)

⁷ *Kemp v. Falk*, (1882) 7 A. C. p. 584.

⁸ In *re Hamilton*, (1905) 2 K.B. p. 789.

⁹ *Juggernaut Agarwallah v. Smith*, (1906) 33 C. 547, 84 C. 173; *G. I. P. Ry. v. Hanmandas*, (1889) 14 B. p. 66.

§ 485.
Mate's
receipts.

or any chattel or book debt.¹ The practice is for the shipper to obtain mate's receipts for the goods placed on board a ship which are afterwards exchanged for bills of lading. Generally the holder of the mate's receipts is entitled to the bill of lading, but only if he is entitled to the goods,² which the holder may not be.³ The captain is only bound to see that the receipt states the right quantity and description of the goods and if he is satisfied that the goods are on board and that they belong to the party demanding the bills of lading,³ he may sign the bills of lading without the production of the receipts.¹ The endorsement of mate's receipts to brokers is of no effect against the captain and owners without notice:¹ a custom that the captain is bound thereby is bad in law as unreasonable.¹ After the bills of lading are signed the mate's receipts are valueless, but if the owner takes them in his own name he has *primâ facie* evinced an intention to reserve control of the goods, and any bill of lading obtained by the buyer in fraud of the owner's rights is of no effect.⁴

§ 486.
Notice.

Knowledge
of agent.

As regards notice the wording of Exceptions 1 and 3 vary as to the necessary qualifications of the buyer. But probably no difference was intended. Although a party may have acted in good faith, still if his agent knew that the pledger was a warehouseman and a merchant and was thus put on enquiry, the principal is affected thereby and is guilty of conversion if he refuse to return pledged goods to their owner.⁵ Either knowledge or means of knowledge

¹ *Hathesing v. Latng*, (1873) L. R. 17 Eq. 92 (mate's receipts endorsed to brokers).

² *Ibid* distinguishing cases where the true owner took the mate's receipts, e.g. *Craven v. Ryder*, (1816) 6 Taunt. p. 434 (owner holding lighterman's receipts); *Ruck v. Hatfield*, (1822) 5 B. & A. 632 (shipper entitled to

mate's receipts): *Schuster v. Mc Kellar*, (1857) 7 E. & B. 704, L.J. Q. B. 281.

³ *Cowasjee v. Thompson*, (1845) 5 Moo. P. C. 165 (where buyers had paid for the goods).

⁴ See § 243.

⁵ *Mandlall v. Bank of Bombay*, (1910) 12 Bom. L. R. 316 C. A.

to which the party wilfully shuts his eyes,¹ is enough, § 486.
 but not mere suspicion.² It was held³ under the Indian Notice.
 Factors Act of 1844, that to establish notice on the part of
 a pledgee, it was sufficient to show that the circumstances
 attending the transaction were such as that a reasonable
 man of business⁴ applying his understanding to them,
 would certainly know that the agent had not authority
 to make a pledge, even if the agent was not also acting
mala fide towards his principals.⁴ Where a seller drew a
 bill of lading in six parts, and endorsed and transferred
 three to Bank A to secure an advance, and inadvertently
 sent one endorsed bill to his buyer, who pledged it with
 Bank B, in a suit by Bank B against Bank A, for the
 goods, it was held that though the pledge to Bank B was
 prior to that with Bank A yet as bank B must have known
 that there were six bills, and were not deceived by the
 buyer's possession of one bill only, they had no right of
 priority.⁵

See also for a definition of notice Trusts Act (II of 1882)
 section 3, and Transfer of Property Act, section³; and as
 to notice to agents, Contract Act, section 229. If a Notice of
 pledgee has notice that the pledgor is acting under a power of
 power of attorney he is deemed to have notice of its attorney.
 terms.⁶ But it has been held⁷ to be extremely important

¹ *May v. Chapman*, (1847) 16 M. & W. p. 361.

² *Navulshaw v. Brownrigg*, (1852) 21 L. J. Ch. p. 911, *Gobind Chunder Sein v. Ryan*, (1861) 9 Moo. I. A. 140, 15 Moo. P. C. 230; see *Ex parte Snowball*, (1872) L.R. 7 Ch. p. 549; *Lord Sheffield v. London Joint Stock*, (1888) 13 A.C. 383 H. L.; see too *Evans v. Trueman*, (1880) 1 Moo. & Rob. 10.

³ *Gobind Chunder Sein v. Ryan*, (1861) 9 M. I. A. 140, 1 W. R. 43 P.O.; cf. *Kartick Churn v. Gopal-*

kristo, 3 C. 264.

⁴ The standard of a reasonable man is correct as regards notice, not as regards good faith: *Whitehorn v. Davidson*, (1911) 80 L. J. K. B. p. 437.

⁵ *Gilbert v. Guignon*, (1872) 8 Ch. A. 16, *sed quere*.

⁶ *Jonmenjoy v. Watson*, (1884) 10 C. 901 P. C. 11 I. A. 94, 9 A. C. 561.

⁷ *Kaltenback v. Lewis*, (1883) 24 D. Ch. 54, 78, in ap. 10 A. C. 617.

§ 486.
Constructive
notice.

Notice
to one
partner.

not to encourage the application of the doctrine of constructive notice to honest mercantile transactions.

According to the English rule if one of two or more partners has notice of the fact that the seller or pledger has no power to sell or pledge, or that the transaction is improper, the other partner or partners acquire no title under a disposition by a factor, even if the partnership is merely for that individual transaction.¹

Whether this applies to section 108 depends on the facts, for under the Contract Act partners are on the footing of mutual agents,² and the principal under the Indian law, which differs on this point from the English, is not affected by notice to an agent, unless it is given or obtained in the course of the business transacted by him for the principal.³

Notice to
agent.

Circumstances which ought to put an agent on enquiry are sufficient to defeat the principal's claim as pledgee,⁴ provided the agent's information was obtained in the course of his employment as agent for that principal.⁴ But mere suspicion is not enough.⁵

Notice of
lien or other
right.

It is to be noted that there is no provision in the section that the transferee must have no notice of "any lien or other right of the seller,"⁶ but if the section applies to dispositions by buyers, any such notice will, it seems, of itself defeat the transaction,⁷ as putting the second buyer on enquiry, but the omission is itself an argument against the exception applying to buyers.

Onus of
proof of
notice.

It has been held in England that a seller who seeks to avoid a sale as fraudulent against a pledgee from his buyer,

¹ *Oppenheimer v. Frazer*, (1907) 2 K. B. 50 C. A.

² Section 251.

³ Section 229, which follows *Dresser v. Norwood*, (1868) 14 C. B. N. S. 574, reversed (1864) 17 C. B. N. S. 466, 481.

⁴ *Mandlall v. Bank of Bombay*, (1910) 12 Bom. L. R. 316.

⁵ *Whitehorn v. Davidson*, (1911) 80 L. J. K. B. 431, where the whole question is elaborately discussed.

⁶ As in section 9 of the English Factors Act 1889.

⁷ See cases re 'Stoppage,' where a different principle applies.

must prove that the pledgee took with notice of the fraud or otherwise than in good faith.¹ The same principle will apply to all cases, the onus is on the owner to show that the proviso applies.

Good faith is distinct from notice, and cannot be properly determined by applying the test of a reasonable man's conduct.¹ Good faith.

There is no rule in English law corresponding to § 487.
Exception 2.

The use of the word 'permission' in this section apparently is not intended to mean anything different from consent in Exception 1. It seems only an instance of the usual inelegant drafting.

Illustration (d) is not happy, as if the buyer knew that the family was joint, the usual presumption being that any property in the possession of a joint Hindu family is joint,² he would not be protected by the section.

Exception 3 is wider than the common Law which is accurately reproduced by section 23 of the Sale of Goods Act, and requires the seller to have a voidable title, and not mere possession.³ The proviso is probably more stringent than Common Law, but offence has been somewhat narrowly interpreted as not including the obtaining of bills of lading in order to pledge them in fraud of the seller and in violation of an express trust imposed by and accepted under the contract⁴; but where the possession was obtained by a promise to act as bailee with the intention of fraudulently pledging the goods, it was said to be a clear case of cheating.⁵ Offence doubtless means an offence within the Penal Code. § 488.
Exception 3.

The proviso.

¹ *Whitehorn v. Davidson*, (1911) 1 K. B. 463 C.A. 80 L.J. K.B. 425 (where 'what amounts to evidence of notice and want of good faith' was discussed); but see *Oppenheimer v. Frazer*, (1907) 2 K.B. p. 62.

² *Taruck Chunder Poddar v.*

Jodeshur, (1873) 11 B.L.R., 198.

³ See *Helby v. Matthews*, (1895) A.C. 471 H. L.

⁴ *Juggernaut Agarwallah v. Smith*, (1906) 38 C. 547, 34 C. 173, but this is a doubtful decision.

⁵ *Mandlall v. Bank of Bombay*, (1910) 12 Bom. L.R. 316.

§ 489.
There must
be a 'de
facto' con-
tract.

Consent to
possession.

There must be a contract, and it seems that the Common Law rule applies that if the fraud was such as negated consent and the possession was obtained by a trick,¹ the possessor could not pass a good title; but the enquiry in the English cases was whether the vendor intended to pass the property and not merely the possession. But in England a very similar rule has been applied to section 25 of the Sale of Goods Act which only requires possession with however consent.² But if the circumstances negative consent the possession would be obtained by cheating and the proviso would apply.³ Cases of a buyer obtaining goods by fraudulently representing that he was someone else,⁴ or the agent of another party⁵ would all amount to cheating. The fraud may amount to larceny by a trick.² But it has been recently held in England that if there is in fact a contract there is no larceny by a trick. But fraud, however gross,¹ only makes a contract voidable,⁷ but may amount to an offence. And it is to be noticed that in England if the seller has a voidable title it is immaterial that it was obtained by an offence,⁸ and the English cases must therefore be considered with caution. In England where one Wallis by means of elaborate note-paper representing Hallam & Co., as having a large business, obtained goods, it was held that there was a *de facto* contract,⁹ for the seller intended to contract with Wallis under the *alias* of Hallam & Co. This was not like a case

¹ *Hardman v. Booth*, (1862) 1 H. & C. 803. *Cole v. N.W. Bk.*, (1875) L. R. 10 C. P. p. 373. *Oppenheimer v. Frazer*, (1907) 2 K. B. 50, *Oppenheimer v. Attenborough*, (1908) 1 K.B., 221.

² *Cahn v. Pockett*, (1899) 1 Q. B., p. 659.

³ For the distinction between false pretences inducing a contract and so-called bare false pretences see *Vilmont v. Bentley*, (1886) 18 Q. B. D. p. 328 C. A., affirmed 12 A. C. 471.

⁴ As in *Cundy v. Lindsay*, (1878) 3 A. C. 459. *Hardman v. Booth*, (1863) 32 L. J. Ex. 105.

⁵ *Higgons v. Burton*, (1857) 26 L. J. Ex. 342. *Hollins v. Fowler*, (1875) L. R. 7 H. L. 757.

⁶ *Whitehorn v. Davison*, (1911) 1 K. B. 463.

⁷ See s. 19.

⁸ S. of G. Act. s. 28.

⁹ *King's Norton Metal Co., v. Edridge*, (1897) 14 T. L. R. 98 *C.A. Stephenson v. Hart*, (1828) 4 Bing. 476.

of a person falsely pretending to be an old customer with whom the seller intended to contract¹ or of an agent of the seller pretending to have received orders from a fictitious firm really being himself that firm,² where there was held to be no contract. But where an order was given by a sham secretary of a fictitious company, it was held there was no contract.³

§ 489.

In England the Court will not grant rescission of an executed contract for the sale of a chattel on the ground of innocent misrepresentation, but only in a case of fraud.⁴ But in India section 18 (3) of the Contract Act has altered the law on this point.

Where the possessor has no title to transfer because there is no voidable contract within the terms of the exception, or because he stole the goods, and sells the goods to a *bonâ fide* buyer, if subsequent to such a sale he enters into a contract with the true owner whereunder, though voidable, he obtains a title to the goods, such title enures for the benefit of the buyer from him.⁵

Where possessor's contract made after sale to a third party.

The contract though voidable subsists until the injured party gives notice to the other side that it is disaffirmed.⁶ The right of avoidance⁷ may be lost if the injured party delays after full knowledge of the facts until the fraudulent promisor is prejudiced,⁸ or the rights of third parties intervene.⁹ But unless that has happened he can disaffirm even after the other party has been adjudged insolvent¹⁰ as the trustee is in no better position than his

§ 490. Time within which a contract may be avoided.

¹ *Hough v. L. & N. W. Ry.*, (1870) L. R. 5 Ex. 51.

⁶ *Reese River Co. v. Smith*, (1869) L. R. 4 H. L. 64.

² *McKean v. Milvor*, (1870) L. R. 6 Ex. 36.

⁷ See § 501.

³ *Star Corn Millers Society v. Moore*, (1885) 2 T. L. R., 620.

⁸ *Clough v. L. & N. W. Ry.*, (1871) L. R. 7 Ex. 26.

⁴ *Seddon v. The North E. S. Co.*, (1905) 1 Ch. 326.

⁹ *Seddon v. N. E. Salt Co.*, (1905) 1 Ch. 326.

⁵ *Whitehorn v. Davidson*, (1911) 80 L. J. K. B. p. 433, 436. But see § 481.

¹⁰ Even after the receiving order, *Tilley v. Bowman*, (1910) 1. K. B. 745.

§ 490. insolvent,¹ nor can he set up the reputed ownership of the insolvent.²

Waiver of
right to
rescind.

However the original contract may have been induced, the original seller may elect to affirm it,³ and so lose any right under the section and he waives the right to disaffirm the contract where he proceeds with it after knowledge of the circumstances entitling him to disaffirm.⁴

Where the vendor, from whom goods were obtained by false pretences amounting to the offence of cheating, has sued and obtained a decree against the vendee for the price of the goods, he cannot afterwards elect to avoid the contract which was voidable only, and follow the goods into the hands of third parties. Once the vendor has exercised his right of election and has in effect affirmed the contract, his title to the goods ceases, and Exception 3 does not enable him to recover the goods from third parties.⁵

§ 491.
To what
contracts
Exception 3
applies.

The wording of the exception leaves it uncertain as to what contracts it refers. For possession may be given under contracts of sale, hire, pledge or bailment, and such contracts may be or become voidable⁶ as being induced by fraud⁷ or otherwise. The Common Law exception generally was applied to contracts of sale, for unless the property had passed to a party he could not give a good title, but it was not confined to such cases.⁸

But unless the possession under this exception is restricted in the same way as in Exception 1, the result would be

¹ *Re Eastgate*, (1905) 1 K. B. § 501.

465.

⁵ *Tholasiram v. Duraji*, (1903)

² *Load v. Green*. (1846) 15 L.J. 15 M. L. J. 375.

Ex. 113, 15 M. & W. 216.

⁶ As to bailments see Contract Act s. 153.

³ As to what amounts to such an election see *Clough v. L. & N. W. Ry.*, (1871) L. R. 7 Ex. 26. *Morrison v. The Universal Marine Ins. Co.*, (1873) L. R. 8 Ex 197.

⁷ See *Mandlall v. Bank of Bombay*, (1910) 12 Bom. C.R. 316.

⁴ See for same principle under waiver of conditions precedent,

⁸ See *Babcock v. Lawson*, (1879) 5 Q.B.D. 284 (a pawnor to whom goods pawned were retransferred for sale).

that a bailee, pledgee or hirer could not give a good title unless the contract, under which they held was or became voidable, that is, only a sufficiently fraudulent or defaulting bailee, hirer or pledgee could, before the contract was avoided, pass a good title. The point has never been raised; in a Bombay case a bailee's contract was voidable for cheating, and therefore the exception did not apply.¹

§ 491.

The presence of this exception seems in itself to show that a buyer in possession of goods is not within Exception 1. For otherwise the exception would have to be read as an exception to Exception 1, and not as drafted to the section itself.

§ 492.
Relation of
Exceptions
1 and 3.

The omission of any power to pass a good title by the transfer of documents of title obtained under a voidable contract is significant, especially when coupled with section 98, for if a buyer is within Exception 1, and the contract is voidable,² any dealing with documents of title is good under Exception 1, whereas if he has possession of the goods, he can only deal with that subject to the limitations of Exception 3.

It is to be noted, however, that Exception 3 does not necessarily show that Exception 1 does not apply to the case of a buyer. The solution may be that when the contract is avoided, the consent necessary, under Exception 1, ceases. The Sale of Goods Act provides by section 23 that a seller of goods with a voidable title thereto can pass a good title to a *bonâ fide* buyer, before his title is avoided: that is to say, although he has neither possession of the goods or of documents of title, but by section 25 (2) a buyer obtaining, with the seller's consent, possession of goods or the documents of title to goods, can pass a good title, but only as if he were a mercantile agent in possession with

¹ See *Mandall v. Bank of Bombay*, (1910) 12 Bom. L.R. 316. in possession of documents of title with the seller's consent,

² According to *Cahn v. Pockett*, (1899), 1 Q.B. 659, a buyer can be for fraud.

§ 492. consent of the owner, and the withdrawal of the consent would end his powers, as he comes under the Factors Act of 1889, section 2 (1), and not section 2 (2) which protects transactions after consent has been withdrawn.¹ Under section 47 there is no such limitation of the buyer's power to pass a title by transfer of documents of title, but that section is subject to the rest of the Act, and is cut down by section 25 into which the Factors Act is imported.² The Indian exceptions may be similarly intended, but probably Exception 1 does not cover the case of a buyer.

§ 493.
**Restoration
of stolen
property.**

Increment to
stolen goods.

Where the proviso applies the goods may be restored to the owner under section 517 of the Criminal Procedure Code. And it has been held in England that on a conviction for theft the owner is entitled not only to recover the goods from an innocent purchaser, but any increment added to them between the date of the purchase and the conviction, for example the calves and milk of stolen cows.³ But the innocent buyer cannot claim moneys expended on the keep of beasts during that period, for he was the then owner.⁴ Though, as Benjamin⁵ points out on principle it seems that he ought to be entitled to the milk while owner but perhaps not to calves if existing at the time of the theft. In India an innocent purchaser was ordered to return a stolen cow, but not its calf which was not an embryo at the time of the theft. No suggestion was made that he ought to account for the milk, but the English cases were not cited.⁶ On a conviction for theft any moneys taken out of the possession of the thief may

¹ This view was not taken in *Cahn v. Pockett*, (1899) 1 Q.B. pp. 658, 658 (where s. 25 (2) was said to include cases where consent was subsequently withdrawn, but that disregards the last words of the section).

² See *Cahn v. Pockett*, (1899) 1

Q.B. 459, but see § 417.

³ *Scattergood v Sylvester*, (1850) 15 Q.B. 506.

⁴ *Walker v. Matthews*, (1881) 8 Q.B.D. 109.

⁵ 5th Ed., 23.

⁶ *In re Verneale*, (1886) 10 M.

25.

be ordered to be given to the owner as compensation under section 519 of the Criminal Procedure Code. § 493.

The meaning of the word 'possession' in this exception is not clear, nor is it in Exception 1. For possession may be actual or constructive. The question might arise where a buyer, under a voidable contract, sells goods at sea. In such a case if the bill of lading were in the buyer's name though the ship was not his, the constructive possession of the goods is with him. Apparently such a sale without the transfer of a document of title, would not defeat the seller's right to stop. It would not do so under section 102 which is probably exhaustive. It seems then that constructive possession is not intended at any rate not that of a carrier. It seems that possession of goods under these exceptions, does not include any possession which does not defeat the unpaid seller's rights.

Meaning of possession.
Constructive.

The case of pledges is provided for by section 178, which provides that "a person who is in possession of any goods or of any bill of lading, dock warrant, warehouse-keeper's certificate, wharfinger's certificate, or warrant or order for delivery, or any other document of title to goods, may make a valid pledge of such goods or documents: provided that the pawnee acts in good faith, and under circumstances which are not such as to raise a reasonable presumption that the pawner is acting improperly: provided also that such goods or documents have not been obtained from their lawful owner or from any person in lawful custody of them, by means of an offence or fraud."

§ 494.
Pledges.

This section has been held to be¹ in most respects similar to section 108.

'Possession' means the same as under section 108.² It does not include the custody of a servant of his master's

¹ Such construction is open to the same criticism as that of section 108.

² *Mandlall v. Bank of Bombay*, (1910) 12 Bom. L. R. 816 C. A.

§ 494.
Pledges.

goods,¹ or the possession of a wife of her husband's jewellery,² or of a hirer,³ or of a warehouseman.⁴ But it has been held that the possession of person authorised to sell, endorse and assign Government promissory notes is sufficient to enable him to pledge them.⁵ A joint owner in sole possession with the consent of his co-owners can pledge.⁶

Sections 178
and 179.

The possession intended by section 178 was held³ not to be the possession of a person who has a limited interest, because that is specially provided for by section 179, and the sections contemplate mutually exclusive cases.⁷ Section 178 was said to refer to the case where the pawnor has a document of title to the goods or possession of the goods unconnected with and independent of any interest of his therein, though as one invested with the symbol or indicia of property he may make a valid transfer.⁸ The meaning of 'possession' was said to be clear as being contrasted with 'custody' in the second proviso.⁸ But an *obiter dictum* that a person in possession under a hire purchase agreement cannot pledge,⁸ seems unsound, for it has been held that a person in possession under a hire purchase agreement, who has not made default in payments, can

¹ *Biddomoye Dabee v. Sittaram*, (1878) 4 C. 497, *Shankar Murlidhar v. Mohanlal*, (1887) 11 B. 704.

² *Seager v. Hukma*, (1900) 24 B. 458.

³ *Naganada v. Bappu*, (1903) 27 M. 424.

⁴ *Mandlall v. Bank of Bombay*, (1910) 12 Bom L. R. 316 C. A.

⁵ *Bank of Bengal v. Macleod*, (1849) 5 M. I. A. 1.

⁶ *Shadi Ram v. Mahtab*, (1895) Punj. Rec. No. 1.

⁷ This cannot mean that a factor having some interest in goods, cannot pledge them except to the extent of his interest: and see *per*

Beadon J. in *Mandlall v. Bank of Bombay*, (1909) 11 Bom. L. R. 926, overruled 12 Bom. L. R. 316; and see *Baldeo Prosad Saha v. Miller*, (1904) 31 C. p. 678, where it was said a mortgagor in possession could pass a complete title. It is quite clear that s. 179 only declares the Common Law, and in no way limits s. 178, see *Adelphi Bk. v. Halifax Sugar Refining Co.*, (1887) 4 T.L.R. 21, "a pledgee of a bill of lading apart from the Factors Acts stands in the shoes of his pledgor."

⁸ Citing *Greenwood v. Holquette*, (1873) 12 B. L. R. 42.

pledge,¹ though a person with a conditional option to buy has been held not to have the possession contemplated by section 108, ex. 1.²

§ 494.

The omission of any mention of possession under a voidable contract is curious, but it may not have been deliberate. Probably the same rule as under section 108 as being the Common Law will be applied.³

Possession by a trustee of a minor is not acquired by an offence or fraud, and a pledge by him is valid.⁴ If a warehouseman obtains possession of goods by promising to be a bailee with the intention of pledging them, this is cheating.⁵ It was held where a buyer was given mate's receipts in his name by the seller, that in spite of a clause in the contract that he should only have them for inspection, his action in obtaining bills of lading from the ship-owner and pledging them in fraud of the unpaid seller, was not an offence or fraud, *sed quaere*.⁶

Offence or fraud.

In one case it was argued that the principle of marshalling applied if the pledgor's legitimate pledges would suffice to cover a bank's advances.⁵

Marshalling.

If goods are pledged with *A*, who does not take possession⁷ and subsequently pledged with *B*, who takes possession, *B* has priority.⁸

Priorities.

¹ *Abdul Hossain v. Rangil Lall*, (1902) Punj. Rec. No. 34.

(1910) Bom. L.R. 316 C.A.

² *Greenwood v. Holquette*, (1873) 12 B. L. R. 42.

⁶ *Juggernaut Agarwallah v. Smith*, (1906) 33 C. 547, 34 C. 173.

³ See *Kartick Churn v. Gopal-kisto*, 3 C. 264, where there was evidence of cheating.

⁷ This is a valid pledge or, strictly speaking, mortgage. *Prish Chandra Roy v. Mungri*, (1904) 9 C. W. N. 14; *Damodur v. Atmaram*, (1906) 8 Bom. L. R. 344.

⁴ *Sundar Deo. v. Bhagwan Das*, (1908) 30 A. 165.

⁸ *Chummun Khan v. Mody*, (1874) Punj. Rec. No. 70.

⁵ *Mandlali v. Bank of Bombay*.

CHAPTER XVI.

Conditions.

§ 495.
What
amounts to
a term of
a contract.

Before considering what terms of a contract are conditions it is necessary to ascertain what amounts to a term of a contract. For every affirmation made at the time of concluding a contract of sale, even if it is included in a written contract, does not amount to an integral part of the contract. But even if it does not form part of the contract an affirmation as being an innocent or fraudulent representation inducing consent to the contract, may afford a ground for repudiating the contract. The subjects of fraud, representations, warranties and conditions are so closely allied and so frequently intertwine that it is necessary to give some account of each of them.

§ 496.
Fraud.
Essentials
for avoiding
a contract
for fraud.

The party seeking to avoid a contract for misrepresentation or fraud must prove¹

- (1) that the representation complained of was made by the other party, or by some one for whose conduct he is responsible² and was made to the plaintiff or with the direct intent that it should be communicated to him, and that he should act on it,³
- (2) that the representation was false in fact,⁴
- (3) that if it amounts to fraud⁵ the other party either knew that it was false or made it recklessly without knowing whether it was false or true,
- (4) that he himself was induced thereby to enter into the contract or any term⁶ of it,

¹ *United Shoe Manufacturing Co. v. Brunet*, (1909) 25 T.L.R. 441 P.C.

² *Ranguath v. Govind*, 28 B. p. 642.

³ *Barry v. Croskey*, (1861) 2 J. & H. 1, 22.

⁴ *Mahomed Golab v. Mahomed Sulliman*, (1894) 21 C. 612.

⁵ Or in India brings the facts

within s. 17 or 18 of the Contract Act.

⁶ Fraud or misrepresentation as to one term or part of a contract makes the whole voidable, *Vicount Clermont v. Tasburgh*, 1 J. & W. p. 119, 120; *Rawlins v. Wickham*, 3 De G. & J. 304; *Kennedy v. Pamama Co.*, L. R. 2 Q. B. 580, 587.

- (5) that immediately on or at least within a reasonable time after discovery that it was false he elected to avoid and did repudiate the contract.¹ § 496.

The last is the most vital as it is a condition precedent to escaping liability under the contract which must be repudiated in its entirety unless it is severable.²

Fraud may be in respect of something outside the contract, that is a representation, or it may relate to an integral part of the contract. In either case if it caused the consent of the other party to the contract it renders it voidable,³ and this is so although it was one of several inducements or part of the inducement⁴ to enter into the contract,⁵ and the plaintiff was also influenced by his own mistake,⁶ or by other motives as well.⁷ What amounts to fraud.

In order to avoid a contract for fraud there is no need to show that any damage resulted.⁸

If the fraud relates to an integral part of the contract or damage results therefrom where it does not, the defrauded party can sue for damages in the former case on the contract, in the latter in tort for deceit. The fraudulent representation may also cause a total failure of consideration, which is a ground for avoiding the contract.

The test as to whether an assertion is part of the contract or not, is, does the party warrant the fact to be as stated, or merely does he say, I know that it is so.⁹ Test whether part of the contract.

¹ But see § 501.

² *United Shoe Manufacturing Co. v. Brunet*, (1909) 25 T.L.R. 441 P.C.

³ Contract Act s. 19.

⁴ *Arnison v. Smith*, (1889) 41 Ch. D. p. 369.

Pertab Chunder Ghose v. Mohendranath, (1889) 17 C. 291, 6 I. A. 233; see *Abaji Annaji v. Laxman*, (1906) 30 B. 426; *Clarke v. Dickson*, 6 C.B.N.S. 458; *Nicol's*

Case, 3 De G. & J. 387; *Derry v. Peck*, 37 Ch. D. 541.

⁶ *Edgington v. Fitzmaurice*, (1885) 29 Ch. D. 439.

⁷ *Smith v. Kay*, (1859) 7 H. L. C. p. 775.

⁸ *Smith v. Kay*, (1859) 7 H.L.C. p. 775; *Central Ry. v. Kisch*, (1867) L.R. 2 H.L. 99.

⁹ *Brownlie v. Campbell*, (1880) 5 A.C. p. 953; see § 505.

§ 497.
Definition.

The definition of 'fraud' given in the Contract Act, section 17, is not very clear. A suggestion as to a fact by one who does not believe it to be true,¹ is clearly fraud. But what belief is enough is another question. But the next section defines a misrepresentation as the positive assertion in a manner not warranted by the information of the person making it of that which is not true, though he believes it to be true. As far as avoiding a contract is concerned it is material to show that it is a fraudulent statement, for otherwise the proviso to section 19 applies, and means of discovering the truth with ordinary diligence are a bar to avoiding the contract, and what is belief is important, for if there is belief no action for deceit lies.²

In order to bring an action for deceit, damage resulting from the fraud must be proved,³ but any sort of damage is enough.⁴

Belief.

Absence of reasonable ground for belief is not fraud *per se*,⁵ but is evidence tending to show that there was no genuine belief.⁵ There must be a false representation made fraudulently, that is either with a knowledge that it is false, or without belief in its truth, or made recklessly with carelessness whether it is true or false.⁵

Active concealment of a fact, if that induces the consent, is fraud.⁶

§ 498.
Article sold with all faults.

A buyer who has agreed to take all risks expressly⁷ or impliedly⁸ cannot avoid a contract for fraud, but though an article is sold with all faults,⁹ yet artifice used by the seller to disguise faults,¹⁰ vitiates the

¹ S. 17 (1).

² *Derry v. Peck*, (1889) 14 A. C. 337. There must be an intention to deceive but the motive is immaterial, *ibid*, p. 374.

³ *Derry v. Peck*, 14 A.C. p. 343.

⁴ *Smith v. Kay*, 7 H.L.C. p. 775.

⁵ *Derry v. Peck*, (1889) 14 A. C. 337.

⁶ Section 17 (2)

⁷ *Arnison v. Smith*, (1889) 41 Ch. D. 343 C. A.

⁸ *Redgrave v. Hurd*, (1881) 2 Ch. D. 1.

⁹ See as to clauses excluding warranties, § 522.

¹⁰ *Schneider v. Heath*, (1813) 3 Camp. 506; cf. *Horsfall v. Thomas*, (1862) 31 L. J. Ex. 322.

sale, but mere knowledge of the faults will not have that effect²: nor the passive acquiescence of the seller in the self-deception of the buyer,³ unless there is a duty on the seller to disclose faults;⁴ but such a clause does not exclude reliance⁵ on the seller's statements.⁶ § 498.

The non-disclosure of a material fact may make that which is stated absolutely false⁷ or the concealed fact may be such as is impliedly represented not to exist,⁸ and non-disclosure after discovering that a statement honestly made is false, is fraud.⁹ Non-disclosure.

It is not competent to a party to contract himself out of the consequences of fraud.¹⁰ Contracting out of fraud.

The onus of proving that a statement is false is on the party asserting that it is so,¹¹ and it must be shown to be false at the time it was acted on.¹² Before that date the statement may be revoked or modified by the party making it.¹³ Onus of proving falsity.

¹ *Early v. Garrett*, (1829) B. & C. 9 928; *Sprigwell v. Allen*, 2 East. 448 n.

² *Baglehole v. Walters*, (1811) 3 Camp. 154; *Bywater v. Richardson*, (1834) 3 L.J. K.B. 164; *Ward v. Hobbs*, (1878) 4 App. Cas. 18, 27; 48 L. J. C. P. 281.

³ *Smith v. Hughes*, (1871) L.R. 6, Q.B. 597, 40 L.J.Q.B. 221; *Hill v. Gray*, (1816) 1 Stark. 434.

⁴ See Contract Act, s. 17, explanation.

⁵ *Baglehole v. Walters*, 3 Camp. 154.

⁶ *Schneider v. Heath*, (1813) 3 Camp. 506; cf. *Horsefall v. Thomas*, (1862) 31 L. J. Ex. 322.

⁷ *Peek v. Gurney*, (1873) L. R. 6 H. L. p. 403; *Arkwright v. Newbold*, (1881) 17 Ch. D. p. 317; *Smith v. Chadwick*, (1882) 20 Ch. D. p. 58.

⁸ *Lee v. Jones*, (1864) 17 C. B.

N. S. p. 506; *Phillips v. Foxall*, (1872) L. R. 7 Q. B. p. 679.

⁹ *Brownlie v. Campbell*, (1880) 5 A.C. p. 950; *Redgrave v. Hurd*, (1881) 20 Ch. D. p. 12.

¹⁰ *Pearson v. Dublin Corporation*, (1907) A. C. p. 354 H. L.; see § 522.

¹¹ *Melbourne Bk. Corp. v. Brougham*, (1882) 7 A.C. 307, 314, 315 P. C.; *Smith v. Chadwick*, (1884) 9 A.C. p. 190-192.

¹² See § 500.

¹³ *Holland v. Manchester and Liverpool District Bk.*, (1909) 25 T. L. R. 386 (correcting entry in pass book) see *Carlill v. Carbolic Soap Ball Co.*, (1893) 1 Q. B. p. 262. The question of the effect of notice of the truth given and an offer to refund money paid was left open in *Armison v. Smith*, (1889) 41 Ch. D. 348.

§ 498.
Substantially
correct.

A representation as to a matter of fact is true if it is substantially correct,¹ though there may be inaccuracies as to unimportant details,² for it is not like a warranty in respect of which a literal deviation constitutes a breach, for exact correspondence between the word and the fact is the very thing contracted for.³

Whole
circum-
stances.

It is sufficient to establish fraud if, taking the whole transaction together, there was a fraudulent representation.⁴

Where no
intention to
fulfil promise.

A promise without any intention of performing it, is also fraud,⁵ as where goods are bought with no intention of paying for them.⁶

§ 499.
Representa-
tion must
relate to a
fact.

The statement must relate to a fact: this does not include a mere promise as to the future which, to be binding, must be a contract.⁷ A statement of intention may, however, be a fact,⁸ or imply that the party knows nothing to the contrary.⁹

Representa-
tion as to
law.

The English doctrine is that the representation must be as to fact, and not as to law.¹⁰ But the modern tendency is to restrict this to cases where knowledge of the law is equally accessible to both parties.¹¹ It is often difficult to distinguish between a misrepresentation of fact and of law,¹² and the tendency is to construe such as of fact,¹³

¹ *Thomas v. Weims*, (1884) 9 A. C. 671, 683, 684, 689, *Hamborough v. Mutual Life Ins. Co.*, (1895) 72 L. T. 140.

² See *Seddon v. N. E. Salt Co.*, (1905) 1 Ch. p. 335; *McKeown v. Bouchard Peveril Gear Co.*, (1896) 65 L.J. Ch. p. 786, 737.

³ *Pawson v. Watson*, (1778) 2 Cowp. 785 *Compania Naviera Vascongada v. Churchill*, (1906) 1 K. B. 237.

⁴ *Aaron's Reefs v. Twiss*, (1896) A. C. 273; *Arnison v. Smith*, (1889) 41 Ch. D. 848, 369.

⁵ Section 17 (3).

⁶ *Load v Green*, (1846) 15 M. & W. 216; *Clough v N.W.Ry.*, (1871)

L. R. 7, Ex. 26. This amounts to cheating—see Penal Code s. 416 Illus. (f).

⁷ *Maddison v. Alderson*, (1883) 8 A.C. 467, 473; *Bellairs v. Tucker*, (1884) 13 Q.B.D. 562; *Maunsell v. Hedges*, 4 H. L. C. 1055.

⁸ *Smith v. Land and House Cor.*, (1885) 28 Ch. D. 7.

⁹ *Edgington v. Fitzmaurice*, (1885) 29 Ch. D. 459.

¹⁰ *Beattie v. Ebury*, (1872) L. R. 7 Ch. 777.

¹¹ Benjamin, 5th Ed. 444. Pollock on 'Contract,' 6th Ed. p. 548.

¹² *Eaglesfield v Londonderry*, (1876) 4 Ch. D. 698.

and it has been said that a representation of law, if fraudulent or wilful, does not come within the rule.¹ The rule does not apply if there is a failure of consideration.² § 499.

The rule does not apply to the construction of documents,³ or to question of private rights,⁴ or to erroneous representations as to the legal effect or meaning of words used, although there is no fraud.⁵ Pollock doubts if the rule applies to India at all, and distinguishes positive assertions as to the law and mere opinions,⁶ and, doubtless, if a party owes a duty to the other, any representation which is false and made without belief, is fraud. Construction of documents.

But, however false and dishonest the artifices or contrivances may be, if the buyer knows the truth and sees through the artifices or devices, he cannot avoid the sale.⁷ Nor can he, if he finds out the truth before he alters his position.⁸ If the representation is a continuing one and becomes untrue before it is acted on, though originally § 500.
Consent must be caused by the fraud.

¹ *Hirschfeld v. L. B. S. C. Ry.*, (1876) 2 Q.B.D. 1; *West London Com. Bk. v. Kitson*, (1884) 13 Q.B.D. p 863; see *Pertab Chunder v. Mohendranath*, (1889) 16 I.A. 233.

² *Forman v. Wright*, (1851) 11 C. B. 481; *Southall v. Regg*, *ibid.*

³ *Beauchamp v. Winn*, (1873) L. R. 6 H. L. 223. A misrepresentation as to the legal effect or contents of a document renders it voidable: *Lloyd v. Grace*, (1911) 2 K. B. 489; *Howatson v. Webb*, (1908) 1 Ch. 1; but a misrepresentation as to the species of the document renders it void: *Bagot v. Chapman*, (1907) 2 Ch. 222; *Carlisle and Cumberland Bk. v. Bragg*, (1911) 1 K.B. 489 (a guarantee signed as being an insurance paper), but see this case criticised in L.Q.R. 1912.

⁴ *Cooper v. Phibbs*, (1867) L.

R. 2 H. L. 149; *Jones v. Clifford*, (1876) 8 Ch. D. 779; *Subbiem v. Arnachala*, (1870) 5 M. H. C. 444; *Dattaram v. Venayak*, (1903) 28 B. 181.

⁵ *Pertab Chunder v. Mohendranath*, (1889) 17 C. 296, 16 I. A. 237; *Wilding v. Sanderson*, (1897) 2 Ch. 534.

⁶ Indian Contract Act, 2nd Ed. p. 97; see *Shet Manabhai v. Bai Rupaliba*, (1899) 24 B. 166, where the plaintiff knew that the agent was acting for an infant.

⁷ *Dyer v. Hargrave*, (1805) 10 Ves. 505; *Barber v. Morris*, (1832) 1 M. & Rob. 62 Dart. on V. & P. 7th Ed. 1091; see ss. 18, 19, Contract Act.

⁸ *Smith v. Kay*, (1859) 7 H.L.C. 759; *Holland v. Manchester and Liverpool District Bank*, (1909) 25 T.L.R. 386.

§ 500.
Must be
false when
acted on.

Onus of
proving
knowledge.

Possible to
find out the
truth.

Onus of
proving
caused
consent.

true when made, he can, if deceived, avoid the contract,¹ and conversely though false, when made, if the representation becomes true before it is acted on, he cannot avoid the contract.² But mere suspicion and partial knowledge does not affect his rights.³ Once fraud is established, the onus of proving knowledge is on the representator,⁴ even in cases when the law ordinarily presumes notice.⁵

The fact that a party could have found out the truth does not affect his rights.⁶ But he cannot avoid the contract although unaware of the true facts, unless he proves that he was induced to contract⁷ by the other's fraud.⁸

But if the representation is material and calculated to induce a party to enter into a contract it is a fair inference of fact⁹ that he was induced thereby, and in order to take away his right to avoid the contract, it must be shown that he had knowledge of the facts contrary to the representation, or that he stated in terms or showed clearly by his conduct that he did not rely on the representation.¹⁰ If the statement is ambiguous, the person

¹ *Anderson's case*, (1881) 17 Ch. D. 373, 377; *Re Scotch Petroleum Co.*, (1883) 23 Ch. D. 413; *Whurr v. Devenesh*, (1904) 20 T. L.R. 385.

² *Ship v. Crosskill*, (1820) L. R. 10 Eq. 73, 85, 86.

³ *Redgrave v. Hurd*, (1881) 20 Ch. D. 1.

⁴ *Price v. Macaulay*, 2 De G. M. & G. 348.

⁵ *Jones v. Rimmer*, 14 Ch. D. p. 590.

⁶ *Bloomenthal v. Ford*, (1897) A.C. 156; see § 504.

⁷ *Macauliffe v. Wilson*, (1898) 26 I.A. 6.

⁸ *Horsfall v. Thomas*, 31 L. J. Ex. 322; *per Cockburn, C. J.*, in

Smith v. Hughes, L.R. 6 Q.B. 605; Contract Act s. 19.

⁹ It was said to be to an inference of law in *Redgrave v. Hurd*, (1881) 20 Ch. D. p. 21; see *Harrison v. Smith*, 41 Ch. D. 369, but this was disapproved by Lord Blackburn in *Smith v. Chadwick*, (1884) 9 A.C. 187, 196; *Arnison v. Smith*, (1889) 41 Ch. D. 348; *Aaron's Reefs v. Twiss*, (1896) A.C. p. 280; *Smith v. Land Corp.*, 28 Ch. D. 7.

¹⁰ *Per Jessel M.R. Redgrave v. Hurd*, (1881) 20 Ch. D. 21; see *Re London and Leeds Bank*, (1887) 56 L.T. 116; *Smith v. Kay*, (1859) 7 H. L. C. 759; *Arnison v. Smith* (1889) 41 Ch. D. p. 369.

alleging he was deceived by it, must show in what sense he understood it.¹ He is not bound to take upon himself the peril of ascertaining the true meaning of an ambiguous statement.² § 500.

In England the view was that if a party made enquiries, that went to show that he was not induced to enter into the contract by the representation.³ In fact, in cases dealing with land it was held that if a purchaser chooses to judge for himself and does not avail himself of all the knowledge or means of knowledge open to him, he will not be allowed to say he was deceived,⁴ if he could have discovered the deception.⁵ But the mere fact of resorting to some means of knowledge is not always inconsistent with reliance upon a representation.⁶

Unless the fraud is such as to negative consent to the contract, and there is consequently no contract at all, a contract is only voidable for fraud, and until avoided is valid, and innocent third parties may acquire valid interests thereunder.⁷

The party deceived may elect to affirm the contract and then cannot repudiate it.⁸ But an unsuccessful attempt to repudiate on one ground, which cannot be substantiated, does not prevent a party on discovering a fresh case of misrepresentation from raising it.⁹ § 501. Option to affirm.

¹ *Smith v. Chadwick*, 20 Ch. D. 27.

² *Martin v. Cotter*, 3 Jan & L. p. 507; *Caballero v. Hentry*, L.R. 9 Ch. 447.

³ *Rawlins v. Wickham*, (1859) 28 L. J. Ch. 188; *Beljemann v. B.*, (1895) 2 Ch. 474 C.A.; see *Clapham v. Shililo*, 7 Beav. 146.

⁴ *Attwood v. Small*, (1835) 6 Cl. & F., 232 H. L.

⁵ *Jennings v. Broughton*, 5 De G. M. & G. 126; *Higgins v. Samels*, 2 J. & H. 460.

⁶ *Redgrave v. Hurd*, 20 Ch. D. 1, 19.

⁷ See under s. 108 Ex. 3.

⁸ *In re Haven Gold Mining Co.*, 20 Ch. D. 151, 164; *Tholasiram v. Duraji*, (1903) 15 M.L.J. 375; see § 490.

⁹ *Re London and Provincial Electric Co.*, (1886) 55 L. T. 670.

§ 501. The deceived party may waive the fraud as by continuing to treat the contract as subsisting^{1,2}, and he cannot thereafter on discovering a fresh incident in the fraud, withdraw his waiver and rescind.¹ But nothing is waiver unless the party had full knowledge of the fraud.³

Time
allowed for
repudiation.

It has been held that the contract after discovery of the fraud must be repudiated within reasonable time⁴ and promptly.⁵ There is however good authority⁶ that unless the delay is great when it is probably conclusive, the right is not lost until the rights of others intervene.⁷ But the doctrine of lying by applies in such cases.⁸ The onus of proving when knowledge was acquired and that the plaintiff knowingly forbore to assert his right is, once fraud is established, on the defendant.⁹

American
view.
Waiver,
question of
fact.

The American view is that "acquiescence and waiver are always questions of fact. There can be neither

¹ *Campbell v. Fleming*, (1834) 3 L. J. K. B. 136; see *Law v. Law*, (1905) 1 Ch. 140; *Seetharama v. Bayanna*, (1894) 17 M. 275; *Whitehouse's case*, (1867) L. R. 3 Eq. 790, 794.

² *Brigg's case*, L. R. 1 Eq. 423; *Selway v. Fogg*, 5 M. & W. 83.

³ *Clough v. L. & N. W. Ry.*, (1871) L. R. 7 Ex. 26, followed in *Aaron's Reefs v. Twiss*, (1896) A. C. 273, 290; *Re Mount Morgan Gold Mine*, 56 L. T. 622; see § 564. For the sort of knowledge necessary, see *Ogilvie v. Currie*, (1868) 87 L.J. Ch. 541; *Sharpley v. Louth and E. C. Ry.*, (1876) 2 Ch. D. 663, 685.

⁴ *United Shoe Co. v. Brunet*, (1909) A. C. p. 389 P. C.; see *Mohun Lall v. Sri Gungaji Cotton Mills*, (1900) 4 C. W. N. 369, 381.

⁵ *Pooley v. Brown*, (1861) 11 C. B. N. S. 566.

⁶ *Scarf v. Jardine*, (1882) 7 A.

C. 345; see *White v. Garden*, (1851) 20 L. J. C. P. 166.

⁷ *Clough v. L. & N. W. Ry.*, (1871) L. R. 7 Ex. 26, followed in *Aaron's Reefs v. Twiss*, (1896) A. C. 273, 290; *Re Mount Morgan Gold Mine*, 56 L. T. 622; see § 564. The question was left open in *Morrison v. Universal Marine Ins. Co.*, L.R. 8 Ex. p. 205; *Gordon v. Street*, (1899) 2 Q. B. 641. In *Taleb Hossein v. Shaik Ameer Buksh*, (1874) 22 W. R. 529, it was said that avoidance must be made at the earliest possible moment.

⁸ *Erlanger v. New Sombrero Co.*, (1878) 3 A.C. p. 1279; *Seetharama v. Bayanna*, (1894) 17 M. 275; *Mohun Lall v. Sri Gungaji Cotton Mills*, (1900) 4 C. W. N., p. 383.

⁹ *Lindsay Petroleum Co. v. Hurd*, L. R. 5 P. C. 221; *Rees v. De Bernardy*, (1896) 2 Ch. 445; *Wall v. Cockerell*, 10 H. L. C. 229.

without knowledge. The terms import this foundation of the action. One cannot waive or acquiesce in a wrong, while ignorant that it has been committed. Current rumour and suspicion are not enough. There must be knowledge of the facts which enable the party to take effectual action. He must not shut his eyes nor rest until the rights of third parties are changed. But the wrongdoer cannot make extreme vigilance and promptitude conditions of rescission. He cannot complain of delay unaccompanied by acts of ownership by which he is not affected."¹ The party setting up a waiver must aver that the party waiving did so knowing that the contract had not been performed² or was voidable,¹ for the burden of proving knowledge of fraud and the time of discovering it is on the party alleging waiver.¹

§ 501.
Knowledge
necessary.

Rights of
third parties.
Laches.

Onus of
proving
waiver.

A contract voidable for fraud cannot be affirmed as to part and avoided as to the rest,³ unless the two parts are so severable as to form two contracts.⁴ But if after notice of the fraud, the party defrauded affirms one of several separate contracts, that does not prevent him from disaffirming the others,⁵ nor does the waiver of one of severable breaches of contract affect the right to avoid the contract for other similar breaches, as a waiver of time of payment of one instalment.⁶

Must avoid
the whole
contract.

Once the contract is disaffirmed as by bringing a suit to set it aside, it seems that acts which would, previous to disaffirmance, have affirmed the contract, are ineffective.⁷

¹ *Peace v. Langdon*, 99 U.S. 578 (a case of fraud); Beach cites for a similar rule as to waiver of broken conditions: *Mohney v. Reed*, 40 Mo. Ap. 99.

² *Mohney v. Reed*, *supra*.

³ *Anarullah Shaikh v. Koylash*, (1881) 8 C. 118; *Abaji v. Laxman*, 30 B. 426; *Pertabchunder v. Mohendronath*, 17 C. 291.

⁴ *United Shoe Manufacturing*

Co. v. Brunet, (1909) 25 T. L. R. 442 P.C.; see Specific Relief Act s. 40; *Inder Pershad v. Campbell*, (1881) 7 C. 474.

⁵ *Re Murray*, (1887) 57 L.T. 223; *Re Metropolitan Coal Consumers Ass.*, (1890) 6 T.L.R. 416 C.A.

⁶ *Hunter v. Daniel*, 4 Hare 420.

⁷ *Foulkes v. Quartz Hill Co.*, 1 C. & E. 156.

§ 502.
How far
restitution is
necessary.

In England the rule is that the right to repudiate depends on the ability to restore the thing sold in its original condition,¹ unless the alteration is caused by something for which the buyer is not responsible² or by the legitimate rights given under the contract.³ But in India this is modified, it seems, by section 64,⁴ which only requires restitution as far as may be, and in Equity the rule only applied where compensation was impossible.⁵

Insolvency of the defrauding party makes no difference, for the trustee is in no better position than the bankrupt.⁶

Rights on
avoidance.

If the promisee avoids the contract he can recover the price paid with interest⁷ but must restore any benefit,⁸ and is entitled to be indemnified as to the obligations and consequences of the contract.⁹ The defrauded party can sue for recovery of any deposit or in a case of doubt in the alternative for specific performance.¹⁰ And can set up fraud as a defence without suing to set aside the contract even if such a suit would be carried by limitation.¹¹

¹ *Urquhart v. Macpherson*, (1878) 3 A. C. 881 P.C. (log of mahogany, cut up); Benj. 5th Ed. 472; *Waddell v. Blockley*, (1879) 48 L.J.Q.B. 517; see *Taleb Hossein v. Ameer Buksh*, (1874) 22 W. R. 529.

² *Head v. Taltersall*, (1871) L. R. 7, Ex. 7 (horse dying); *Adam v. Newbigging*, (1888) 13 A. C. 308.

³ As by reasonable acts of inspection: see § 622.

⁴ Cf. Transfer of Property Act, s. 35; Specific Relief Act s. 38, 41, and see *Sinaya Pillai v. Munisami*, (1898) 22 M. 289; *Tejpal v. Ganga*, (1902) 25 A. 59; *Kuvarji v. Moti Haridas*, (1878) 3 B. 284.

⁵ *Lindsay Petroleum Co. v. Hurd*, (1874) L. R. 5 P. C. 221, cited in

Lindley on 'Partnership' for this proposition.

⁶ *In re Eastgate*, (1905) 1 K.B. 465; 74 L. J. K. B. 324.

⁷ *Karberg's Case*, (1892) 3 Ch. 1 C.A.

⁸ Contract Act s. 64; *Bamfield v. Rogers*, (1900) 1 Ch. 354.

⁹ *Newbigging v. Adam*, (1886) 34 Ch. D. 582, not affected in appeal: 13 A. C. 308. As to the right of the seller in avoidance to retake possession of goods sold, see § 649; and for damages in an action for deceit, see under 'Damages,' § 652 and § 504.

¹⁰ *Ibrahimhai v. Fletcher*, 21 B. 851.

¹¹ *Rangnath v. Govind*, 28 B. 689; *Orr v. Sundra*, 17 M. 255.

Even if a statement does not amount to fraud, it may, as being a misrepresentation, afford a ground for avoiding a contract. An assertion made at the time of contracting may be part of the contract or a representation¹ which though not part of the contract, is a statement which was an inducement to contract and intended to be acted on, as distinguished from a mere expression of opinion or mere commendation by a seller of his wares² or mere words of expectation or estimate which do not form part of the contract at all or give rise to any claim for damages;³ or it may give rise to an estoppel,⁴ which of itself gives no cause of action, but prevents the party making the statement from denying its truth.⁵

§ 503.
Representation.

A representation is a statement or assertion made by one party to another before or at the time of the contract

Words of expectation or estimate.

¹ There is no technical meaning attached to this word in England and it is used to mean both a representation and an integral part of the contract, but semble there is a technical meaning attached to it in the Contract Act, i.e. to a misrepresentation.

² *Chalmers v. Harding*, (1868) 17 L.T.N.S. 571 (but see *Varley v. Whipp*, (1900) 1 Q.B. 513); *Power v. Barham*, (1836) 4 A. & E. 473 (as to modern pictures); cf. *Jendwine v. Slade*, (1797) 2 Esp. 572 (as to old pictures); *Lomi v. Tucker*, (1829) 4 C. & P. 15 (pictures); see *DeSewhanberg v. Buchanan*, (1832) 5 C. & P. 343; *Jennings v. Broughton*, 17 Beav. 234; *Denton v. Macneil*, L.R. 2 Eq. 352; *Smith v. Chadwick*, 20 Ch. Div. 27, 9 A.C. 187.

³ *McConnell v. Murphy*, (1873) L.R. 5 P.C. 203 (sale of, say, about 600 spars); *Gwillim v. Daniell*, (1835) 2 Cr. M. & R. 61,

5 Tyr. 644 ('all the naptha made, say from,' held words of estimate only); *McLay v. Perry*, (1881) 44 L.T. 152 (sale of pile of scrap iron, both parties thought it was 150 tons—held no contract to supply more than in the pile); *Leeming v. Snaith*, (1851) 16 Q.B. 275 (all, say, not less than—held contract for at least that amount); see *Morris v. Levison*, (1876) 45 L.J.C.P. 409, 1 C.P.D. 155; ('say about' held not words of mere estimation in a charter); cf. cases of 'Sales of Cargoes.'

⁴ See *Maddison v. Alderson*, (1883) 8 A.C. p. 473, 5 Ex. Div., p. 596, Evidence Act s. 115.

⁵ *Secon v. Lafont*, (1887) 19 Q.B. D. 68, 70; *Low v. Bouverie*, (1891) 3 Ch. p. 101, 105. The distinction between fraud, warranty and estoppel is fundamental, *ibid.* p. 102, but may be extremely fine: *Grosvenor Hotel v. Hamilton*, (1894) 2 Q.B. 836.

§ 503. of some matter or circumstance relating to it, and, even though contained in a written instrument, is not an integral part of the contract.¹

Preliminary stipulation.

A representation may, it is said, be a preliminary stipulation on which the contract is based, but this seems to amount to part of the contract.² Or it may be the inducement to enter into the contract,³ though not necessarily the sole inducement⁴; and, if innocent, giving a right to avoid the contract; if fraudulent, a further right to an action for deceit.

A misrepresentation, if innocent, to be effective, must have caused consent and a mistake as to the substance of the contract; whereas fraud, if inducing consent, need not relate to the substance of the contract,⁵ nor need a misrepresentation if it is a positive assertion not warranted by the information of the person making it, which approximates to fraud.

§ 504.
Terms of a contract and misrepresentation distinguished.

As it was said in an early Indian case a warranty must be distinguished from a misrepresentation; the latter is antecedent to the contract, and unlike a misrepresentation, a warranty is independent of the information of the person making it.⁶

This case, however, was before the Contract Act which has altered the Common Law rules⁷ as to innocent misrepresentations. There is a great distinction⁸ between statements which are terms in a contract and statements which are inducements to enter into the contract, that is

¹ *Behn v. Burness*, (1868) 32 L. J. Q. B. 204.

² See § 507.

³ *Gordon v. Street*, (1899) 2 Q. B. 641, 645.

⁴ *Abaji v. Laxman*, (1906) 30 B. 426.

⁵ Sections 17, 19; *Kennedy v. Panam Mail Co.*, (1867) L. R. 2 Q. B. p. 587.

⁶ *Turner Morrison v. Ralli*, (1862) 2 B.L.R. O.C. 127 per Peacock C.J.

⁷ Sections 18 Ex. 3. At Equity the rule was always as in the Contract Act: *Redgrave v. Hurd*, (1881) 20 Ch. D. 1.

⁸ See Anson, 9th Ed. p. 151; *Behn v. Burness*, (1868) 32 L.J. Q.B. 204.

representations properly so called.¹ A representation if effective at all, vitiates the formation of the contract and makes it voidable. Whereas a term of the contract if not performed, does not affect the formation of the contract, but, if a condition, operates to discharge the injured party from his obligation if he so elects, or if he goes on with the contract or the term was originally only a warranty, gives him a right of action *ex contractu*. In the case of a warranty materiality or immateriality is not in question, whereas in a mere representation materiality is generally essential.² The Contract Act recognises this distinction by treating of representations in sections 18 and 19 and the effect of "warranties" in sections 117 and 118.³

§ 504.
Distinguish-
ed from
terms of the
contract.

At Common Law a representation, even if untrue, did not give the other party any right to avoid the contract unless it was made fraudulently⁴ or unless it was material, that is, there must in consequence be a complete difference in substance between what was supposed to be, and what was taken, so as to constitute a failure of consideration.⁵

The Contract Act provides that where consent to a contract is caused by an innocent misrepresentation⁶ causing a mistake as to the substance of the contract it is

¹ The term 'representation' in England has no technical meaning, but semble it has under the Contract Act.

² Contract Act s. 19; *In re Universal Non-Tariff Ins. Co.*, (1875) 44 L.J. Ch. 761; *Stokes v. Cox*, (1857) 26 L.J. Ex. 113; *Thompson v. Hopper*, (1858) 27 L.J. Q.B. 441.

³ The application of s. 19 to an implied condition of description in *Shoshi Mohun Pal v. Nobo Kristo*, (1878) 4 C. 801, was wrong, see § 605.

⁴ *Derry v. Peek*, (1889) 14 A.C. 387; *Angus v. Clifford*, (1891) 2

Ch. 449 C. A. But in Equity it was enough to show that it was material and false; *Redgrave v. Hurd*, (1881) 20 Ch. D. 1; as to a duty to correct a representation when found to be false, see *Brownlie v. Campbell*, (1880) 5 A. C. p. 950.

⁵ *Kennedy v. Panama Mail Co.*, (1867) L. R. 2 Q. B. 580, 587; *Flight v. Booth*, 1 Bing. N.C. 377; *Jacobs v. Revell*, (1900) 2 Ch. 858; *In re Puckett*, (1902) 2 Ch. 258.

⁶ S. 18(3), a representation must refer to a fact and not to law: *Shet Manibhai v. Bai Rupaliba*, (1899) 24 B. 166, but see § 498.

§ 504.
Proviso to
section 18.

voidable, unless the party misled had means of discovering the truth with ordinary diligence.¹ This proviso¹ is not recognised in England²; where if the buyer is offered means of verifying a statement he may decline to do so and rely on it, but if he investigates he is not induced by the statement to contract,³ if he might have detected the truth.⁴

Limited
construction.

The Courts⁵ have shown an inclination to limit the application of this proviso.⁶ It has been held that the buyers owe no duty to the sellers to discover whether their representations or their agent's representations are correct.⁷ The Privy Council held that a bidder was perfectly justified in relying on what was said by an auctioneer at a Court sale.⁸ It has been held inapplicable where a bill of exchange was sold apparently good on the face of it and the defect therein was only discoverable by a trained lawyer, although the purchasers were a bank⁹; or where a seller represented that there was a practicable road for the delivery of a boiler.¹⁰

Fraud.

The proviso does not apply to cases of fraud as distinguished from innocent misrepresentations.¹¹

Not limited to
constructive
notice.

But the proviso is not limited to cases where the party can be fixed with constructive notice of the true facts.¹²

¹ Section 19.

² *Central Ry. v. Kisch*, (1867) L. R. 2 H. L. 99; *Brownlie v. Campbell*, (1880) 5 A. C. p. 952; *Redgrave v. Hurd*, (1881) 20 Ch. D. 1; see also *Smith v. Land Corp.*, (1885) 28 Ch. D. 7; *Aaron's Reefs v. Twiss*, (1896) A.C., p. 279.

³ Fry on 'Specific Performance' 4th Ed. 297.

⁴ *Jennings v. Broughton*, 5 De G. M. & G. 126 (shares); *Higgins v. Samels*, 2 J. & H. 460.

⁵ Which seems justifiable from the first two illustrations.

⁶ But see *Shoshi Mohun Pal v. Nobo Kristo*, (1878) 4 C. 801,

where the application of s. 19 was unsound; see § 605.

⁷ *J. C. Shaw v. Bill*, (1884) 8 M. 38.

⁸ *Mahomed Kala Mea v. Harperink*, (1908) 36 I.A. 32.

⁹ *In re Nursey Spinning Co.*, (1880) 5 B. 92.

¹⁰ *Johnson v. Crave*, (1874) 6 N. W.P. 350.

¹¹ *Abdulla Khan v. Girāhāri*, (1904) Punj. Rec. No 49; *Morgan v. Govt. of Haidarabad*, (1888) 11 M. 419, 439.

¹² *Mohun Lall v. Sri Gungaji Cotton Mills*, (1900) 4 C. W. N. 381. But see § 486.

A plaintiff relying on misrepresentations should be pinned down to those alleged in his plaint.¹ § 504.

The definitions given in section 18 of misrepresentations are not altogether in accord with the English rules. A positive assertion² not warranted by the information of a person making it, of that which is not true, though he believes it is true,³ does not appear to be based on any English doctrine. It seems to follow the view of the Appeal⁴ Court in *Derry v. Peck* which was reversed in the House of Lords.⁵ It has been held that hearsay is not sufficient to warrant an assertion.⁶ Positive assertion.

The burden of proving a reasonable ground for belief is on the party asserting it.⁷

It is to be noted that a positive assertion need not relate to a fact or cause a mistake as to the substance of the contract, but it must induce consent to the contract.

It seems that whether the contract is voidable for fraud⁸ or misrepresentation⁹ the buyer can sue for damages under section 75. Pollock¹⁰ says otherwise, but this is a reminiscence of an English doctrine which the section excludes. The word "rescission" must apply to a voidable contract, as section 55 to which section 75 clearly applies, speaks of contracts as voidable.¹¹ It has been suggested in England that previous avoidance is a defence to a claim for damages if the action is against the Damages.

¹ *Mohun Lall v. Sri Gungaji Cotton Mills*, (1900) 4 C.W.N. 381. But see § 486.

² See *Leather v. Simpson*, (1886) L. R. 11 Eq. p. 406.

³ See § 18 (1).

⁴ 37 Ch. D. 541.

⁵ 14 A. C. 337.

⁶ *Mohun Lall v. Sri Gungaji Cotton Mills*, (1899) 4 C. W. N. 369.

⁷ *Alman v. Oppert*, (1901) 2 K. B. 576, 70 L. J. K. B. 745. See

§ 499.

⁸ At Common Law an action for deceit lay if damage was suffered.

⁹ At C. L. apparently only restitution and indemnity could be claimed; see Benj. 5th Ed. 443.

¹⁰ Contract Act, 2nd Ed. p.342; Cunningham and Shepherd, 10th Ed. 275, agree with Pollock's view.

¹¹ See [s. 2. (i).] For the other remedies, see § 502.

§ 504. actual representor.¹ But the authorities cited do not support this,² and this is not so in India under section 75. Even in England it was held that a buyer of goods or chattels (as distinguished from shares) concerning which the vendor makes a fraudulent misrepresentation, may, on finding out the fraud, return³ the goods and have his action to recover any damages he has sustained by reason of the fraud.⁴ The same rule applies where he cannot rescind the contract as restitution is impossible owing to his own act or misfortune.⁵

Making
representa-
tions good.

The doctrine of making good representations is said to be without authority in England.⁶ That is to say that instead of merely obtaining rescission or damages (in England for a fraudulent representation), the representee could at Equity have specially enforced a contract consisting of the terms of the contract in fact made, varied, supplemented, or rectified by the addition of a promise that representation was true. It is said that the cases where this doctrine is suggested amount to no more than cases of estoppel,⁷ cases of compensation in damages, or

¹ Laws of Eng. vol. 20, 730 ; Bower on ' Actionable Misrepresentation ' 211; Pollock on Contract ' 7th Ed. 524, 6 Ed. 719. But Kerr on " Frauds " 4th Ed. p. 8, doubts this, as the point has not been before the H.L., and cites Brett, M.R. in *Cunnington v. G. N. Ry.* 49 L.T. 393, 394 ; *Pretty v. Child*, 71 L. J. K. B. 512.

² *Annison v. Smith*, 41 Ch. D. 348 ; *Ship v. Crosskill*, (1870) L. R. 10 Eq. 73.

³ It seems his right is to reject them.

⁴ *Houldsworth v. City of Glasgow Bank.*, (1880) 5 A.C. p. 323, where it was held that a purchaser of shares, unless he can re-

scind the contract, cannot sue the Company or partnership in which he holds such shares : he might sue the actual representor : *ibid.* p. 340; cf. *Clarke v. Dickson*, (1859) 6 C.B.N.S. 453.

⁵ *Ibid.* p. 338.

⁶ Pollock on "Contract" 6th. Ed., 719, 7th. Ed. 524, Laws of Eng. vol. 20 p. 721; *Re Fickus*, (1900) 1 Ch. 331, 334, 335. But Kerr on "Fraud" 4th. Ed. p. 8, considers the question open and approves of the doctrine, relying on *Cunnington v. G. N. Ry.*, 49 L. T. 393, 394 ; cf. *Pretty v. Child*, 71 L. J. K. B. 512.

⁷ *Citizen's Bank of Louisiana v. First National Bank*, (1893) L. R. 6 H. L. 352, 360.

rescission, or specific restitution, which are the ordinary damages, and cases of enforceable promises.

In India under section 19 a party to a contract whose consent was caused by fraud or misrepresentation, may insist that the contract shall be performed and that he shall be put in the position in which he would have been if the representations had been true. And this is the discarded English doctrine of making good representations.

In order to ascertain whether an affirmation made at the time of sale is an integral part of the contract, the intention with which it was made must be considered, and this applies whether it is contained in a written document¹ or not.² For if it was so intended it is an integral part of the contract,³ no matter of what nature it be.⁴ If it is contained in the written contract its nature is generally a question of law, but questions of fact may be involved.⁵ In determining whether an affirmation was intended to be an integral part of the contract, a decisive test is whether the vendor assumes to assert a fact of which the buyer is ignorant or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge and on which the vendee may be expected also to have an opinion and exercise his judgment.⁶ And another test is, was the affirmation seriously intended to

§ 505.
Test whether representation or integral part of the contract.

¹ *Behn v. Burness*, (1863) 32 L. J. Q. B. 204.

² *De Lassalle v. Guildford*, (1901) 2 K. B. 215, 70 L. J. K. B. p. 586.

³ Per Buller J. in *Pasley v. Freeman*, (1789) 3 T.R. 51, 1 Sm. L. C. 9th Ed. 87.

⁴ *Hopkins v. Tanqueray*, (1854) 15 C.B. 130; *Carter v. Crick*, (1859) 4 H.&N. 412; *Budd v. Fairman*, (1881) 8 Bing. 48; *Pasley v. Freeman*, (1789) 3 T.R. 51, 1 Sm. L.C. 11th Ed. 66; *Bannerman v. White*,

(1861) 31 L. J. C. P. 28; *Studley v. Bayley*, (1862) 31 L. J. Ex. 483, 489.

⁵ *Bentsen v. Taylor*, (1893) 2 Q. B. 274, 280.

⁶ *De Lassalle v. Guildford*, (1901) 2 K B. 215, approving the passage in Benj. 3rd Ed. 607. This was a case of a lease, but the same principle was held to apply as in sales of goods; see *McConnell v. Murphy*, (1873) L. R. 5 P. C. 218 ("say about").

be the basis of the contractual relation between the parties.¹

**§ 506.
Warranty
how made.**

A warranty may be either included in the contract of sale,² or may be given after the contract of sale is completed,³ in which case it requires fresh consideration,⁴ being in fact a supplemental contract.

It need not be given simultaneously with the conclusion of the bargain; it is sufficient if given during the course of dealing which leads up to the bargain.⁵

**§ 507.
Affirm-
ation
anterior to
contract.**

An affirmation made anterior to the contract does not, according to Mr. Chalmers,⁶ constitute a warranty, though it may give rise to an action for deceit. He explains *Bannerman v. White*⁷ as being a case of an anterior representation constituting the basis on which the parties subsequently contracted. Benjamin⁸ considers that in that case the representation was expressly made a condition precedent to the formation of the contract and holds that it is a question of fact whether a representation is part of the contract though anterior to it. This view has recently been confirmed in the Appeal Court where it was said that in *Bannerman v. White* the judgment was based upon the intention of the parties that the contract should be null and void if the hops had been treated with sulphur, and that the purchasers, not being able to sell the hops were in a position to return them.⁹ Such a term may be

¹ *Ibid.*

² *Hopkins v. Tanqueray*, (1854) 15 C. B. 130, 23 L. J. C. P. 162 (horse); cf. *Bannerman v. White*, (1861) 31 L. J. C. P. 28 (hops by sample); *Stucley v. Bayley*, (1862) 31 L. J. Ex. 488 (yacht).

³ *Heilbutt v. Hickson*, (1872) L. R. 7 C. P. 438 (Army boots); as to an alleged warranty previous to a sale, see *Malcolm v. Cross*, (1898) 35 Sc. L. R. 794.

⁴ *Rescola v. Thomas*, (1842) 3 Q. B. 234 (warranty of a horse).

⁵ *Cowdy v. Thomas*, (1877) 38

L. T. 22; see *De Lassalle v. Guildford*, (1901) 2 K. B. 221.

⁶ Chalmers, 6th Ed. p. 27, citing *Hopkins v. Tanqueray*, (1854) 15 C. B. 130, 23 L. J. C. P. 162.

⁷ (1861), 31 L. J. C. P. 28.

⁸ 5th Ed. p. 658; see *Percival v. Oldacre*, (1865) 18 C. B. N. S. 398.

⁹ *Wallis v. Pratt*, 108 T. L. R. p. 121 C. A., (1910) 2 K. B. 1003, reversed on other points, (1911) A. C. 394.

proved by parol evidence although the contract has been reduced to writing,¹ if it is collateral to the written terms.² But parol evidence is inadmissible to enlarge the scope of a warranty contained in the writing.³

§ 507.

Parol evidence.

In India the buyer can rescind the contract for an anterior misrepresentation under sections 18 and 19 if it in fact induced him to consent to the contract, and if he had not the means of discovering the truth with ordinary diligence, provided it goes to the substance of the contract.⁴

But it seems that the stipulation in *Bannerman v. While* was not a mere representation, but a part of the contract.⁵ On its non-performance the Court said the contract was null and void, but semble it was only voidable as for a broken condition which was not, it seems, a contingency. The difficulty in calling it a condition felt by the Court seems to be met by the explanation given in *De Lassalle v. Guilford*,⁶ though that case seems hard to distinguish from *Lamare v. Dixon*,⁷ where the contract was made on the assurance that the cellars leased would be dry. Lord Cairns said this representation was not a guarantee, and that it was not introduced into the contract on the face of it and the result of that was that in all probability Lamare could not sue in a Court of law for a breach of any such undertaking. But the suit was for specific performance and was dismissed and the remarks were *obiter*.

Stipulation anterior to contract.

Once it is decided that a statement is really a part of the contract, the difficult question arises as to whether it is

§ 508.
Condition or warranty,

¹ See Pollock, 8th Ed. Ap. 756, on collateral representations inducing contracts such as leases; see § 39.

² *DeLassalle v. Guilford*, (1901) 2 K.B. 215 C.A. (term added to a lease), where the cases are discussed; *Harsan v. Runciman*, (1904) 10 Com. Cas. 19 (collateral warranty added by parol to a charter party). But see § 507.

³ *Lloyd v. Sturgeon*, (1901) 85 L. T. 162.

⁴ See *Whurr v. Devenish*, (1904) 20 Times L.R. 385.

⁵ See § 563; and see *Harsan v. Runciman*, (1904) 10 Com. Cas. 19.

⁶ (1901) 2 K.B. 215.

⁷ L. R. 6 H.L. 414, 428.

§ 508.
Condition or
warranty.

condition¹ or an independent agreement, and this is to be collected from the evident sense and meaning of the parties, and must depend on the order of time in which the intent of the transaction requires their performance.² It may be a condition although the parties call it a warranty.³

Whether a promise is dependent on or independent of the promise made by the other party, or whether it is a condition precedent or concurrent to any demand for performance of the contract, or whether it may be neglected and the right to sue on the contract remain subject to a cross action or counter claim for its non-performance, are difficult questions, and only a few general principles can be enumerated.

Confusion of
terms 'war-
ranty' and
'condition.'

The first difficulty to be noted is as to the terms used. In England the somewhat indiscriminate use of the terms 'warranties' and 'conditions'⁴ has been finally put an end to by the Sale of Goods Act, which defines a warranty but not a condition. As it was held in the House of Lords, prior to the Sale of Goods Act there had been a great deal of litigation and of discussion as to matters which formed only ground of a breach of warranty and matters which amounted to a condition; and the remedies in the one case and in the other were the subject of a great deal of discussion.⁵ There does not seem, however, to have been any difficulty as to the remedy once it was decided to what the stipulation amounted. In the Contract Act the term 'condition' is not used and the word 'warranty' seems to have the meaning attached to the

¹ For the various kinds of conditions, see § 515 and § 524.

² *Per* Lord Mansfield, *Kingston v. Preston*, (1778), cited in *Jones v. Barkley*, (1781) 2 Dough. 665; see *Bentzen v. Taylor*, (1893) 2 Q.B. 218; *The Moorcock*, (1889) 14 P. D. 64.

³ Sale of Goods Act, s. 11 (b). But see *Wallis v. Pratt*, (1911) A. C. 394.

⁴ See *Wallis v. Pratt*, (1910) 103 T. L. R. 118 C. A., (1911) A. C. 394 H. L.

⁵ *Wallis v. Pratt*, (1911) A. C. 394 H. L.

present term 'condition' in England.¹ The meaning in England is now clear ; a condition is a stipulation in the contract which if unfulfilled gives a right to the promisee to refuse performance of his part of the contract : a warranty only gives him on its breach a claim to damages.

§ 508.
Condition
and warranty
defined.

Although the term warranty is frequently used to denote a condition, still it seems inconvenient to use any other phrases, but in these lectures the term condition will be used in the English sense.

It is competent to the parties to make any contract they please² and to bargain as to what facts shall be deemed material and to what extent. On the one hand, they can make the existence of any specified state of facts or the truth of any affirmation an essential term of their contract, so that any variation therefrom will justify the promisee in repudiating the contract even after delivery and acceptance of goods sold thereunder.³ On the other hand, they can make any fact or affirmation, although forming part of their contract, still only the subject matter of a collateral agreement, so that the failure to fulfil it will not afford ground for avoiding the principal contract, but only give rise to a claim for damages.⁴

The difficulty is to ascertain what the intention was where the contract is not explicit.

The law was explained by Fletcher-Moulton, L. J.,⁵ on a recent case. "A party to a contract who has performed or is ready and willing to perform his obligations under that contract is entitled to the performance by the other contracting party of all the obligations which rest upon him. But from a very early period of our law it has

§ 509.
Explana-
tion of rule.

¹ See § 559.

² *Moll Schutte v. Luchmi Chand*, (1898) 25 C. 505 F. B.

³ *Bannerman v. White*, (1861) 10 C. B. N. S. 844.

⁴ Pollock on Indian Contract

Act, 2nd Ed., p. 94, says this principle was only recognised during the latter half of the 19th century.

⁵ The contract in this case was for unascertained goods (seeds) sold by sample as of a particular description.

§ 509. been recognised that such obligations are not all of equal importance. There are some which go so directly to the essence of the contract and are so essential to its very nature, that their non-performance may fairly be considered by the other party as a substantial failure to perform the contract at all. On the other hand there are other obligations which though they must be performed, are not so vital that a failure to perform them goes to the substance of the contract. Both clauses are equally obligations under the contract and the breach of one of them entitles the other party to damages. But in the case of the former class he has the alternative of treating the contract as being completely broken by the non-performance and if he takes proper steps, he can refuse to perform any of the obligations resting upon himself, and sue the other party for a total failure to perform the contract.¹ This passage does not emphasize the fact that the whole question turns on the original intention of the parties which was clearly pointed out in the House of Lords² though in other respects the judgment of Fletcher-Moulton, L.J., was adopted. The same principle applies to India.³

§ 510.
Warranty
may be of
any nature.

There is nothing inherent in a clause of a contract of sale whereby it can be distinguished as belonging to one or other of the classes named. As has been pointed out a stipulation which in one set of circumstances is a condition precedent, may in another be only intended as a subsidiary term.³ The principle is simple, however difficult its application may be, namely that a party must perform every stipulation in his bargain, but if the parties so intend the failure to perform a stipulation may give no right to the other party to rescind the contract but only

¹ *Wallis v. Pratt*, (1910) 103 L.T.R. p. 122 C.A. adopted by H. of L. (1911) A.C. 394.

² See *per* Garth, C.J. in *Mitchell*

Ried v. Buldeo, (1887) 15 C.1.

³ *Behn v. Burness*, (1863) 3 B. & S. 751; *Oppenheim v. Fraser*, (1876) 34 L.T. N.S. 524.

to claim damages : the whole matter is one of intention. The parties cannot substantially perform their contract, unless the intention was that substantial performance would suffice subject to compensation for the deficiency.

If the contract is in writing¹ and unambiguous it is, according to Blackburn, a matter of construction ; if it is ambiguous, the Court may look at the surrounding circumstances to discover what the parties probably intended²; but the Court must not import into the contract anything which, it would not be clear to any reasonable man, must have been present to the minds of both contracting parties, and agreed to by both.³

§ 511.
When construction a matter of law.

But it is established law that the original⁴ intention of the parties must be looked at with regard to the circumstances of each particular case⁵ and having regard to such circumstances the intention is to be ascertained according to the ordinary rules⁶ for the construction of written instruments.⁷

¹ The construction is then a matter of law: *Emery v. Wells*, (1906) A.C. 515 P.C.

² Blackburn 3rd Ed. 211.

³ *Sanders v. McLean*, (1882) 52 L.J. Q.B. 481, 11 Q.B.D. 327.

⁴ *Wallis v. Pratt*, (1911) A.C. 394 H.L.

⁵ *Bentsen v. Taylor*, (1893) 2 Q.B. 280; *Elliot v. Crutchley*, (1906) A.C. 7; *Paul Beier v. Chotalall*, (1904) 30 B. 1; see § 32.

⁶ Thus parol declarations subsequent to the contract cannot be used to explain it, but if the words are ambiguous they may be explained by previous or contemporaneous parol declarations: *Houlderv. Commissioners of Public Works*, (1908) A.C. 276.

⁷ 1 Wms. Saund. (1870) Ed. 549, 2 Sm. L.C., 11th Ed. 12; see *Graves v. Legg*, (1854) 9 Ex. 709; (declaration of name of ship); *Behn v. Burness*, (1863) 3 B. & S., 751 Exch. ("now in port" in

charter party) distinguish *Seeger v. Duthie*, (1860) 8 C.B. (N.S.) 45 (readiness of ship to sail); *Roberts v. Brett*, (1865) 11 H.L. Cas. 337 (giving bond for due performance); *Chanter v. Hopkins*, (1838) 4 M. & W. 399 (sale of patent article), where it was held that the stipulations were conditions precedent; also compare *Poussard v. Spiers*, (1876) 1 Q.B.D. 410 (appearance on first night of opera a condition precedent), and *Bellini v. Gye*, (1876) 1 Q.B.D. 183 (agreement to attend rehearsals for so many days, held a collateral agreement): *Azémar v. Casella*, (1867) 36 L.J. C.P. 263; *Heywood v. Hutchinson*, (1867) L. R. 2 Q. B. 447; *Barnard v. Faber*, (1893) 1 Q. B. 340 C. A. cf. *Pust v. Dowie*, (1864) 5 B. & S. 20 (ship not less than 1,000 tons); *Jowitt v. Spencer*, (1847) 1 Exch. 647 Ex. Ch. (sale of mine, finding coal not a condition precedent).

§ 512.
Question
depends on
intention.

Depends on
common
sense.

The question depends on the intention of the parties,¹ whether the goods are specific or not²; and to this intention, once it is discovered, all technical forms must give way.³ To decide whether a term is of the essence of a contract, *i. e.* a condition, the Court must look at the whole scope of the transaction to see what the parties really meant.⁴ The decision depends not on any formal arrangement of words, but on the reason and sense of the thing, as it is collected from the whole contract.⁵ It is a question of obvious good sense to be determined by the application of common sense to each particular case.⁶

§ 513.
No *ex post*
***facto* con-**
struction.

The instrument ought to be construed with reference to the intention of the parties when it was made irrespective of the events which may afterwards occur.⁷ For in commercial contracts any system of construing a contract *ex post facto* is no part of the English Law.⁸ Even if subsequent events frustrate the object of the contract, such frustration will not convert a stipulation into a condition if it were not originally intended to be one.⁹

¹ Sale of Goods Act s. 11; *Hopkins v. Tanqueray*, (1854) 15 C.B. 130; *Carter v. Crick*, (1859) 4 H. & N. 412; *Budd v. Fairman*, (1831) 8 Bing 43; *Pasley v. Freeman*, (1789) 8 Term. Rep. 51, 2 Sm. L. C. 11th Ed. 66; *Bannerman v. White*, (1864) 31 L. J. C. P. 28; *Stucley v. Bayley*, (1862) 31 L. J. Ex. 483; as to admissibility of parol evidence, see § 507.

² *Sada Kavaur v. Tadepally*, (1907) 30 M. p. 289 C. A., citing *Gurney v. Womersley*, (1854) 4 E. & B. 133, 142; *Azimar v. Casella*, L. R. 2 C. P. C. p. 431, 677.

³ *Roberts v. Brett*, (1865) 11 H. L. C. p. 344; *Stavers v. Curling*, (1836) 3 Bing. N. C. p. 368; *Barnard v. Faber*, (1898) 1 Q. B. 340.

⁴ *Kishan Prasad Sinha v. Purnender*, (1911) 14 C.L.J. 40 (as to time being of the essence.)

⁵ *Ritchie v. Atkinson*, (1808) 10 East. 306.

⁶ *Stavers v. Curling*, (1836) 3 Bing. N. C. p. 368.

⁷ *Behn v. Burness*, (1863) 32 L.J.Q.B. p. 207, disapproving *Dimeck v. Corlett*, 12 Moo. P. C. C. 199, which was said to be immersed in the specific facts therein set out: *ibid* p. 208.

⁸ *Wallis v. Pratt*, (1911) A.C. p. 400 H. L., disapproving *dicta* in *Ellen v. Topp*, (1851) 6 Ex. p. 401.

⁹ *Ellen v. Topp*, (1851) 6 Ex. 424; as to the Indian Law regarding subsequent impossibility, see § 572.

The cases in which it has been said that a stipulation is at one time a condition precedent and not at another are all *cases* of waiver after knowledge of the breach,¹ and are now it seems overruled.² The view taken in *Soolan Chand v. Schiller*³ was that the conduct of the parties in an instalment contract as regards previous instalments might be considered to determine whether time was of the essence of the contract with regard to a later instalment, but this seems unsound for a waiver as to one instalment is not a licence for future breaches of the contract.⁴

§ 513.

According to Garth, C. J., the rules laid down in the notes to *Cutter v. Powell*,⁵ are generally speaking pretty sure guides in solving questions as to whether a stipulation is a condition precedent.⁶ Where a promise made by one party to a contract goes to or affects the whole consideration moving to the other party or to adopt the language of Blackburn, J.,⁷ where it goes to the root of the matter so that failure to perform it by the one party would render the performance of the rest of the contract by that party a thing different in substance from what the other party has stipulated for,⁸ it is a concurrent condition.⁹

§ 514.
Rules for
determin-
ing the
question.

Where it
affects the
whole con-
sideration.

Where it goes
to the root of
the contract.

¹ *White v. Bealon*, (1861) 7 H. & N. 42, per Bramwell B; *Carter v. Scargill*, (1875) L. R. 10 Q. B. 564.

² *Wallis v. Pratt*, (1911) A.C. p. 400 H.L., disapproving *dicta* in *Ellen v. Topp*, (1851) 6 Ex. p. 401.

³ (1878) 4 C. 258.

⁴ *Hunter v. Daniel*, 4 Hare, 420.

⁵ 2 Smith's L. C. 6th Ed. p. 18, where the rules are copied from the notes to *Pordage v. Cole*, (1669) 1 Wms. Saund. 820.

⁶ *Per* Garth, C. J., *Carlisle v. Ricknauth*, (1882) 8 C. 809; see *Bastin v. Bidwell*, (1881) 18 Ch.

D. 238, where the cases are reviewed.

⁷ According to the Editors of the Laws of England this is the modern test.

⁸ Or as it was put in *Bentsen v. Taylor*, (1898) 2 Q.B. 280 "one of the first things to be considered is to what extent the accuracy of the statement would be likely to affect the substance and foundation of the adventure which the contract is intended to carry out."

⁹ Garth, C. J., said it was a condition precedent, but that is not so.

§ 514.
Where it
affects part of
the consider-
ation.

If not made
essential.

But where it only partially affects the consideration and may be compensated for in damages, it is not a condition precedent.¹

But it has been since held that circumstance that one of the conditions of a contract only affects part of the consideration is not *per se* sufficient to make it collateral to the main contract. It is capable of being so construed but cannot be so regarded unless it also appear that the term was not intended by the parties to go to the root of the whole contract,² and this is undoubtedly so for the parties may make any apparently trivial stipulation a condition precedent.³ But generally if it only goes to part of the consideration it is an independent promise, *i.e.* a warranty.

Part perform-
ance.

It makes no difference⁴ if there has been part performance prior to the breach of the condition precedent.⁵

Rules for
determinin ..

In addition to the two rules quoted by Garth, C. J., there are three others which are generally quoted in this connection.⁶

Order of
performance.

(1) When a day is appointed for doing any act, and the day is to happen or may happen before the promise by the other party is to be performed, the latter may bring an action before performance which is not a condition precedent, *aliter* if the day fixed is to happen after the performance, for then the performance is deemed to be a condition precedent.

¹ Citing *Bellini v. Gye*, (1876) L. R. 1 Q. B. D. 183; *Graves v. Legg*, (1854) 23 L. J. Ex. 228, 9 Exch. p. 716; cf. *Oxford v. Pro-vand*, (1868) L. R. 2 P. C. 135. 156.

² *Bank of China v. American Trailing Co.*, (1894) A. C. p. 271 P. C.

³ *Bellini v. Gye*, (1876) 1 Q.B.D. 183.

⁴ *Per* Garth, C. J., *Carlisle v. Ricknauth*, (1892) 8 C. 809; see *Bastin v. Bidwell*, (1881) 18 Ch. D. 238, where the cases are reviewed.

⁵ *Ibid.* citing *Withers v. Reynolds*, (1831) 1 L. J. K. B. 30, 86 R. R. 782. but see § 564.

⁶ See notes to *Pordage v. Cole*, adopted in notes, *Cutler v. Powell*, *supra*.

(2) Where ¹ each party is to do an act at the same time as the other, these are concurrent conditions and neither party can maintain an action for breach of contract without averring that he has performed or has offered to perform what he himself was bound to do.²

§ 514.
Concurrent
performance.

(3) Where from a consideration of the whole instrument it is clear that the one party relied upon his remedy and not upon the performance of the condition by the other, such performance is not a condition precedent. But if the intention was to rely on the performance of the promise, and not on the remedy, the performance is a condition precedent,³ or concurrent.⁴

Intention to
rely on
remedy and
not on per-
formance.

All these rules were said by Bramwell, B., to be very excellent guides but not arbitrary tests.⁵

Not arbitrary
tests.

In India it has been held that in the case of a specific thing where in addition to the affirmation there is a separate warranty⁶ also in the agreement "*the existence of such a separate warranty shows that the matter of the warranty is not a condition or essential part of the contract but that the intention of the parties was to transfer the property in the subject of the sale at all events.*"⁷ In such a case on a breach of the warranty if made in good faith, the contract is not voidable but only compensation can be claimed.⁸

Separate
warranty.

Rules for
determining.

Separate
stipulation.

¹ This rule is adopted in the Sale of Goods Act, 28 and by s. 54 of the Contract Act.

² See Benjamin, 5th Ed. p. 561, (1669) 1 Wms. Saund. 320 (b), (1795) 2 Sm. L. C. 1.

³ Per Jervis, C. J. in *Roberts v. Brett*, (1856) 18 C. B. 561, 25 L. J. C. P. 280, also in 11 H. L. C. 337.

⁴ See *re Scott*, (1895) 2 Ch. 603.

⁵ *Roberts v. Brett*, (1859) 6 C. B. N. S. 633.

⁶ Another instance of confusion of technical terms.

⁷ The passage in italics is a quotation from Pollock on 'Contracts' 7th Ed., 484.

⁸ *Sada Kavaur v. Tadepally*, (1907) 30 M. p. 289 C. A., citing Pollock on 'Contract' 7th Ed. 484, and Williams on 'Vendors and Purchasers' 732, 540. (In the 2nd Ed. there is no such statement). The decision itself seems unsound, for it conflicts with *Gurney v. Womersley*, (1854) 24 L. J. Q. B. 46, where the fact that a security sold was of some value was held insufficient. But the whole question being whether there is a failure of the whole consideration, is always difficult: see for principles *Kennedy v. Panama Mail Co.*, (1867) L. R. 2 Q. B. p. 587.

§ 514. The conclusion shows that if made *mala fide* even a breach of warranty is sufficient to make a contract avoidable.¹ But the deduction from the presence of a separate stipulation is, it seems, unsound.² The case was one of a sale of a specific mortgage bond subject to all faults which proved invalid as a mortgage as being attested by only one witness. The passage relied on from Pollock is obscure ; no authority cited supports it and the learned author precedes immediately to add that whether such a statement is a warranty or condition is a matter of fact. Pollock's remarks refer to the English doctrine that a stipulation in regard to a specific thing sold can only be a warranty once the property has passed, which it seems has no place in Indian law.³ The use of technical terms in the passage is unfortunate and elsewhere condemned by the author.

It seems a curious deduction to make that the insertion of a stipulation shows that it is a warranty, for in commercial transactions the insertion of a clause invariably adds to and does not diminish its effect.

American
view.

According to the American law, conditions will be construed as dependent unless a contrary intention appears by the terms of the contract.⁴

§ 515.
Stipulation
solely for
benefit of
promisee.

A clause may be a stipulation introduced solely for the benefit of the promisor,⁵ and he can then waive it and insist on performance of the contract without it.

¹ *Kennedy v. Panama Mail Co.*, (1867) L R. 2 Q.B. 580, *i.e.* fraud.

² A somewhat similar argument was rejected in *Bannerman v. White*, (1861) 31 L.J.C.P. 28.

³ See § 559.

⁴ *Davis v. Jeffries*, 58 N.W. Rep. 815; *Lester v. Jewett*, 11 N.Y. 458.

⁵ *Neill v. Whitworth*, (1865) 34 L. J. C. P. 155, 35 L. J. C. P. 304;

Bank of China v. American Trading Co., (1894) A.C. p. 272 P.C.; *Havens v. Middleton*, (1853) 10 Hare 641; cf. *Hauksley v. Outram*, (1892) 8 Ch. p. 376, 378 (condition for formal contract); but see *Lloyd v. Nowell*, (1895) 2 Ch. 744. There may be a contract though not formally drawn up: *North v. Percivall*, (1898) 2 Ch. 128, 132.

The question of warranty or condition¹ involves the question of what is performance of the contract.

§ 516.
What performance is sufficient.

The first essential rule of performance is that the parties must perform their promises,² and the seller has not launched his case for non-acceptance of the goods tendered until he has shown that he tendered what he was bound by his bargain to tender.³ If the bargain was for specific goods, he must deliver the very goods which were earmarked for fulfilment of his contract; if he agreed to supply unascertained goods, he must deliver goods answering in every respect to the description in the contract. To quote the classical judgment of Lord Abinger⁴ "if a man offers to buy peas of another, and he sends him beans, he does not perform his contract: but that is not a warranty. There is no warranty that he should sell him peas: the contract is to sell peas, and if he sends him anything else in their stead it is a non-performance of it."

Under the Contract Act the seller in order to make a valid tender must offer to perform the whole of what he has promised to do⁵: and a condition is really part of the promise. If he refuses or incapacitates himself from performing his promise in its entirety, the buyer has a right to put an end to the contract.⁶ The same rule is expressed in section 51; and section 55 only gives latitude

§ 517.
A party must offer to perform the whole of his contract.

¹ Used in the English sense.

² Contract Act s. 37.

³ *Bowes v. Shand*, (1877) 2 App. Cas. p. 455; cf. *Motichand v. Fulchand*, (1898) 26 C. p. 155 O. C.

⁴ *Chanter v. Hopkins*, (1888) 4 M. & W. p. 404, 51 R. R. p. 654, see *Azémar v. Casella*, (1867) L.R. 2 C. P. p. 679 p. 447, 36 L. J. C. P. 124, 263; *Drummond v. Van Ingen* (1887) 12 App. Cas. 284. Pollock on 'Contract' 527, 530; Chalmers

5th Ed. p. 83; *Bowes v. Shand*, (1877) 2 Ap. Cas. p. 480.

⁵ See § 38.

⁶ See § 39. But if the contract is divisible so as to consist of two separate contracts, the breach of a condition precedent to one, is no excuse for not performing the other as to which all conditions have been satisfied: *Wilson v. Lindon*, (1865) L. R. 1 C. P. 61; *Wilkinson v. Clements*, (1872) 8 Ch. A. 96.

§ 517. where time is not of the essence of the contract, which it generally is in mercantile contracts.¹

Substantial performance.

The general rule was the same at Common Law; there was no rule that substantial performance would suffice. As Leake puts it²: the performance necessary to discharge a contract must be in strict accordance with the terms. Another learned author³ says a breach of a contract to entitle the other party to rescind must consist in the non-performance of something essential. This is only the other way of looking at the contract. If a seller or buyer has promised to do anything, he must do it; but the terms of the contract may show that the real intention was that a literal performance was not meant, and that every departure from the terms was not to be a ground for repudiation, *e. g.*, the intention may be that the non-fulfilment of a term is to be compensated for by damages and is not a ground for repudiation. This intention is generally evinced when there are several stipulations to be performed, for where there are many acts and duties to be performed one party cannot always exact minute performance⁴. But the promisor must do what he has agreed to do within the limits of the variation contemplated by the parties.

Where several stipulations.

Bona fide

Addison⁵ points out that performance must be a substantial⁶ *bona fide* performance in accordance with the true meaning of the parties, and not a mere compliance with the latter of the engagement in violation of the compact.

§ 518.
De minimis.
As to inferiority.

The view recently taken by the English Appeal Court, was, reversing the Lower Court's judgment for the amount

¹ *Bowes v. Shand*, (1877) 2 App. Cas. p. 468 H. of L.

² Leake, 5th Ed. 585.

³ Sm. L. C. 11th Ed. Vol. II p. 87.

⁴ *Slavers v. Curling* (1886)

³ Bing .N. C. 355; see *Rhymney v. Brecon*, (1900) 83 L. T. 111, C. A. 69 L. J. Ch. 313.

⁵ Addison, 10th Ed., 126.

⁶ Clearly meaning not illusory.

claimed less allowance for inferiority, that the seller cannot sue for the price of goods unless he can prove that he was ready and willing to deliver, and had delivered or tendered all the goods in a merchantable condition and of the quality required subject of course to the qualification, if it be necessary to mention it, that the law does not regard as an exception that to which the rule of *de minimis* or the rule of insignificance can apply¹; but subject only to that qualification it is for the vendor to prove that he has delivered or tendered delivery of goods which were in accordance with the contract.²

§ 518.
De minimis.

This principle was applied in a case where more goods than ordered were tendered, but it was only applied because there was nothing to show that the sellers insisted on payment for the excess; had they done so it was said there might have been a difficulty.³

As to quantity.

Primâ facie the seller cannot deliver goods by instalments, he has no right to split up the performance of the contract unless the contract itself gives him that right,⁴ nor can he demand immediate acceptance of the whole if delivery is to be by instalments.⁵

§ 519.
No right to deliver by instalments apart from contract.

The parties can make any agreement they please and the contract by its terms may be for substantial performance

§ 520.
Substantial performance.

¹ In India under s. 39 the question would be whether such variation was contemplated.

² *Jackson v. Rotax Co.*, (1910) 2 K. B. 987, 945; cf. *Hopkins v. Hitchcock*, (1863) 14 C.B.N.S. 65, 32 L. J. C. P. 154, for the rule *de minimis* where the jury held variation to be immaterial; cf. Specific Relief Act s. 14; cf. *Easterbrook v. Gibb*, (1887) 3 T. L. R. 401 C. A.; *Johnson v. Gaskain*, (1892) 8 T. L. R. 70.

³ *Shipton v. Weil*, (1912) 29 T. L. R. 269, where 4,950 tons 55 lbs. were tendered under a contract

for 4,950 tons, and rejected for excess. The buyers relied on the S. of G. Act s. 30 (2) and *Tanvaco v. Lucas*, 28 L. J. Q. B. 150; Joyce, J., relied on a dictum in *Harland v. Burstall*, 6 Com. Cas. 113.

⁴ *Simson v. Gora Chand Doss*, (1883) 9 C. 478; cf. S. of G. Act s. 31. (1). As to where a right to deliver by instalments is implied, see *Colonial Ins. Co. v. Adelaide Ins. Co.*, (1886) 12 A.C. 128 P.C.

⁵ *Ramdeo v. Cassim Mamoojee*, (1893) 21 C. 173 C. A.

§ 520.
Parties may
make their
own contract.
Allowance for
inferiority.

with an allowance for any inferiority: but unless it is so provided the buyer cannot be compelled to take goods with an allowance of inferiority.¹ In one Indian case the judgment seems to imply that substantial performance is all that is required, but that was also held to be only allowable within such limits as might by reasonable implication be properly inferred from the strict words of the contract,² and it was held that the difficulty in making goods accurately answering to the contract was no ground for allowing latitude in performance.³

§ 521.
Something
equally
good.

It need hardly be said that it is of no use for the seller to argue that what he tendered was as good as that bargained for.⁴ Strange to say in one case this was attempted. The contract was that rice should be sent in double bags, and they were tendered in single bags, as it was shown that double bags were important to the buyer for his market and were considered as absolutely essential for the transit contemplated, it was held that the mode of packing affected the quality and description of the thing sold, and the buyer could reject the goods. The defence raised was that the particular single bags were as good as the usual two bags, but no evidence was allowed to be adduced on the point as being immaterial, though in fact the rice arrived safely.⁵

But if the term is for the promisor's exclusive benefit he may waive it⁶ or perform it in any way satisfactory to himself.

¹ *Haridas Khandelwal v. Kalumull*, (1903) 30 C. 649; *Jackson v. Rolax Co.*, (1910) 2 K. B. 987, 945 C. A.; see also § 522 for contracts with all faults.

² *A. B. Miller v. The Gourifore Co.*, (1871) 8 B. L. R. 285 C. A.

³ The fact that performance may be impossible does not show that a turn is not on condition.

South British F. & M. Ins. Co. v. Brozo N. Shaha (1909) 86, CP. 534.

⁴ *Legh v. Lillie*, (1860) 6 H. & N. 165; *Forman v. The Liddesdale*, (1900) A. C. 190 P. C.

⁵ *Makin v. The London Rice Mills Co.*, (1869) 20 L. T. N. S. 705 C. A. 17 W. R. 768.

⁶ *Havens v. Middleton*, (1858) 10 Hare 641; see § 515.

As stated above the general rule is that the buyer cannot be compelled to accept goods which do not answer to the stipulations express or implied in the contract, with an allowance for inferiority of quality.¹ But he may by the terms of his bargain, have contracted to do so and a clause against rejection and providing that the goods should be taken and any dispute as to quality referred to arbitration is binding.²

§ 522.
Allowance
for
inferiority.

But even where the contract provides for an allowance for inferiority, it is not a good tender to offer unmarketable goods or goods not merchantable within the meaning of the contract; the percentage of inferiority must be reasonable³ and the buyer can reject goods for any variation in quality beyond what was in the contemplation of the parties⁴ or if they do not answer at all to the description in the contract⁵ or if they are not merchantable under the description in the contract.³ For the widest clause negating any warranty as to quality or description cannot be construed to mean that where one kind of goods are ordered, the seller may send something quite different⁶ and this was held to be so although the sale was by sample of acid which had been examined, but in which the defect was latent,⁷ for however completely the seller may have guarded himself against contracting that the thing was of any particular quality, it was impossible to construe the contract in any other way than that it was

Unmerchant-
able goods.

Variation
beyond what
was contem-
plated.

Different
kind of
goods.

¹ *Haridas Khandelwal v. Kalumull*, (1903) 30 C. 649 O. C.; Benjamin, 5th Ed. 999; *A.B. Miller v. Gouripore Co.*, (1871) 8 B. L. R. 285, see § 522.

² *Leary v. Briggs*, (1905) 6 F. 857 Ct. of Sess. (Scotch).

³ *Cooverjee Bhoga v. Rajendra N. Mukerjee*, (1909) 36 C. 617, 623.

⁴ *A. B. Miller v. Gouripore Co.*, (1871) 8. B. L. R. 285.

⁵ *Azémar v. Casella*, (1867) L. R. 2 C. P. 677; *Gorton v. McIntosh*, (1888) W. N. 103 C. A.

⁶ *Howcroft v. Laycock*, (1898) 14 T. L. R. 460 Div. Ct.; but see *Wallis v. Pratt*, (1910) 2, K. B. 1003 C. A. overruled on H. L. (1911) A. C. 394.

⁷ *Josling v. Kingsford*, (1863) 32 L. J. C. P. 94; see *Mody v. Gregson*, (1868) 38 L. J. Ex. 12.

§ 522. a part of the agreement that the subject of the sale should be the oxalic acid of commerce.¹

The cases in the last three notes must be considered in the light of the explanation to section 113: the seller may expressly negative that the goods are of any description.

Clause
against any
warranty.

In a recent case the Appeal Court had to consider the effect of a clause in a contract for the sale of seeds by sample, described as of a certain kind. The clause provided that the sellers gave no warranty, express or implied, as to growth, description, or any matter, and that they should not be held to guarantee or warrant the fitness for any particular purpose or its freedom from injurious quality or from latent defect. It was held that the clause protected the sellers from an action for a breach of warranty, overruling *Howcroft v. Laycock*²: the fact that the remedy of rejecting the goods was lost by acceptance did not affect the case.³ There was no question of fraud⁴ in the case.⁵ *Josling v. Kingsford* was explained as being a suit for non-delivery. It was not suggested that the clause protected the seller from the effect of delivering goods not of the kind contracted for, but only from an action for breach of warranty, the condition of being of the description given having been waived by acceptance. The House of Lords⁶ reversed the Appeal Court and laid it down that a condition waived by acceptance is not degraded into a

¹ *Josling v. Kingsford*, (1868) 32 L. J. C. P. 94; see *Mody v. Gregson*, (1868) 38. L. J. Ex. 12.

² (1898) 14 T. L. R. 460.

³ *Wallis v. Pratt*, (1910) 103 T. L. R. 118 C. A. Fletcher-Moulton, C. J., dissenting a very powerful judgment, and semble the correct view, since adopted in the H. of

L. (1911) A.C. 394.

⁴ For no agreement will protect a seller from the consequences of his own fraud: *Pearson v. Dublin Corporation*, (1907) A. C. p. 354, H. of L.

⁵ *Ibid.* p. 124.

⁶ (1911) A. C. 394.

warranty *ab initio*, but the remedies for a breach are similar to those applicable to a breach of warranty. The decision turned on the wording of the contract; it was admitted that in a sale by description a seller can throw the risk of an honest mistake on the buyer,¹ but to do so he must use apt words. This is specifically provided for in India by section 113. But the English case as it turned on the technical meaning ascribed to "warranty" in the English Act, is of little value in India, save as emphasising the necessity of using apt words.

§ 522.

Clause
against any
warranty.

With the clause as to no warranty in *Wallis v. Pratt*² should be compared the clause in *Shepherd v. Kain*,³ which was a vessel advertised for sale as copper-fastened on the terms that she was to be "taken with all faults, without allowance for any defects whatsoever." The vessel was not what was called copper-fastened in the trade, and it was held that the seller was liable for the misdescription, for the words "all faults" meant "all faults which the vessel might have consistently with it being the thing described," *i.e.*, a copper-fastened vessel.⁴ But where a vessel was described as teak built and the terms were "with all faults" and without any allowance for any defect or error whatever, it was held that words "or error whatever" distinguished the case from *Shepherd v. Kain*,³ and the buyer could not recover though the vessel was not teak built.⁵

With all
faults.

¹ It seems that he is not protected by such a clause unless, in the case of unascertained goods, he has honestly and reasonably tried to supply goods as described, and that if he acted negligently or deliberately supplied inferior goods or wrong goods, he would be liable: *see* for principle *Dunn v. Bucknall*, (1902) 2 K. B. 614 (exceptions under a bill of lading): if there is fraud no

clause gives protection: *Pearson v. Dublin Corporation*, (1907) A. C. p. 354.

² (1911) A.C. 394.

³ (1822) 5 B. & Ald. 240; cf. *Kain v. Old*, (1824) 2 B. & C. 627.

⁴ But *see Sada Kaur v. Tadepally*, (1907) 30 M. 284 C.A. and note thereon in § 523.

⁵ *Taylor v. Bullen*, (1850) 5 Ex. 779.

**§ 523.
A clause
against
rejection.**

It is clear that a clause in a contract against rejection and providing for a reference to arbitration for allowance in case of inferiority must be read and interpreted consistently with the main object of the contract and not so as to destroy it, and the goods must be of the kind ordered: the buyer cannot be compelled under such a clause to take what he never wished to buy,¹ and even if the contract is to supply goods "with all faults" a tender of goods worthless as merchantable commodities would be no performance of the contract.²

Indian rule.

As regards India the explanation to section 113 shows that if the seller may³ by the contract avoid the implication of any warranty⁴ that the goods are commercially known as of any denomination. But that does not mean that he is not bound to tender goods corresponding to the bargain. A man may contract to sell goods without any warranty at all, but the buyer must receive something that answers to the description given in the contract, however limited or guarded that description may be.⁵

But a clause "subject to all faults" in respect of the sale of a specific thing was considered in Madras⁶ to cover practically any defect, and a buyer of a mortgage was held under such a clause to be bound to take a mortgage signed by only one attesting witness.

¹ *Vigers v. Sanderson*, (1901) 1 K.B. 608. O.C. (laths of wrong lengths).

² *Peters v. Planner*, (1895) 11 T.L.R. 169.

³ But the words must be apt, *Wallis v. Pratt*, (1911) A.C. 894; cf. *Prince of Wales Dry Dock Co v. Fownes*, (1904) 90 L. T. 527 C.A.

⁴ In the section this term connotes a condition.

⁵ *Cooverjee Bhoga v. Rajendra Mukerjee*, (1909) 36 C. 617; see *Bombay Burmah Trading Co. v.*

Aga Mahomed, (1911) 15 C.W.N. 981 P.C.

⁶ *Sada Kavaur v. Tadehally*, (1907) 30 M. 284 C.A.; this case conflicts with *Shepherd v. Kain*, (1824) 2 B. & C. 627, set out in § 522, and semble a sale of a mortgage means of a valid mortgage and the ruling is unsound. The fact that the document was of some value would not suffice in England; see *per Fletcher Moulton, L.J.*, in *Wallis v. Pratt*, (1910) 103 T. L. R. 118 C.A. and § 608.

But if the seller acts fraudulently no clause can protect him, though he may by apt words protect himself against the fraud of his agents.¹

§ 523.
Fraud.

A custom not to reject goods sold as per sample is good, not being unreasonable or uncertain or contrary to the contract.²

Custom not to reject.

A contract of sale may be absolute or conditional.³ There are two classes of conditions, they may either be statements or promises to be made good or performed by the party by whom they are made or collateral events or contingencies, there being no promise that the event or contingency shall happen. In the former case the non-performance of the condition by the promisor, unless excused by law, gives a right to the purchaser to treat the contract as repudiated,⁴ i.e., he is discharged from his part of the contract and further has a claim for damages.⁵ In the latter case the obligations of both parties are suspended till the event takes place. On the non-fulfilment of the condition in the one case the obligation of the contract does not attach, in the other the contract is broken.⁶ The Indian Contract Act discards the term condition but preserves the distinction referred to above by dealing separately with contingent⁷ contracts and reciprocal promises.⁸

§ 524.
Classes of Conditions

Two classes of contracts subject to a condition.

The law laid down in sections 31-36 accurately represents the English Law.⁹ Illustrations of such contracts are to be found in various contracts of insurance, and sections 31, 32, 35 are also illustrated by contracts for sale of goods "to arrive."¹⁰

Contingent contracts.

¹ *Pearson v. Dublin Corporation*, (1907) A.C. p. 354 H. of L.

⁵ *Ibid.*, s. 75.

² *In re Walkers and Shaw*, (1904) 2 K.B. 152 O.C. 72 L.J. K.B. 825, 90 L.T. 454; see S. of G. Act, s. 35.

⁶ See Chalmers, 2nd Ed. p. 165; 6th Ed. p. 178.

⁷ Ch. III. s. 31-36.

⁸ Ss. 51-58.

⁹ Cf. S. of G. Act s. 1 (2).

⁹ Benjamin, 5th Ed. p. 558.

⁴ Contract Act s. 55.

¹⁰ See § 583.

§ 525.
Contracts
are "prima
facie"
permanent.

Primâ facie every contract is permanent and irrevocable and it lies upon a person who says that it is revocable or determinable to show either some expression in the contract itself or something in the nature of the contract from which it is reasonably to be implied that it was not intended to be permanent, but was to be in some way or other subject to determination.¹ It may, however, be abandoned by long neglect.² The contract may be determinable by notice and such notice may be waived.³

§ 526.
Sale
dependent
on
happening
of event.
Duty to
give notice.

So too an agreement to sell may be conditional on the happening of an event. The general rule is that a man who binds himself to do anything on the happening of an event is bound to take notice at his own peril and to comply with his promise when the event happens,⁴ and the promisee need not give the promisor notice of the happening of the event,⁴ unless the promisee has reserved himself an option under which he can control the event, or unless the event is one peculiarly within the promisee's cognisance,⁵ when means of knowledge is not sufficient,⁴ or unless notice must be given by the terms of the contract when it has been said a letter properly addressed and posted is sufficient notice although it does not reach the addressee,⁶ but it seems that this must depend on the contract and there may be an absolute undertaking to give actual notice.⁷

§ 527.
Conditions
precedent.

Conditions in the sense of promises are of three kinds.

¹ *Llanelly Ry. v. L. & N. W. Ry.*, L.R. 8 Ch. 949, 42 L. J. Ch. 887, L.R. 7 H.L. 567, 45 L. J. Ch. 539, cited in *Kashi Mahlon v. Maharaju Iswari*, (1907) 5 C. L. J. 727; see *Bruner v. Moore*, (1904) 1 Ch. 305 for inferred agreement to alter.

² *Morgan v. Bain*, (1875) L.R. 10 C.P. 15; *Bond v. Walford*, (1886) 32 Ch. D. 238.

³ *Macnaghten v. Paterson*, (1907) A.C. 488.

⁴ *Haule v. Heming*, (1617) Viner's Abr. Vol. V., 271, 6 M. & W. 454. *Tredway v. Machin*, (1904) 91 L. T. 310.

⁵ *Vyse v. Wakefield*, (1840) 9 L. J. Ex. 274, 6 M. & W. p. 453; *Torrans v. Walker*, (1906) 2 Ch. 166.

⁶ *Clemens v. Norfolk*, (1906) 11 Cas. Com. 141. *Sed quere*, and cf. cases of payment sent by post, § 293.

⁷ *Beyts Craig v. Otto Martin*, (1892) 16 B. 389 (premature notice is not sufficient).

When a promise is wholly dependent on the fulfilment of another, the latter is a condition precedent.¹

When a promise must be fulfilled concurrently with another, they are concurrent conditions.²

§ 528.
Concurrent
conditions.

Where it is a term of the contract that the parties will be relieved from all or some of the duties under it upon the happening of a certain event, it is a condition subsequent.³

§ 529.
Conditions
subsequent.

An instance of a condition subsequent is a sale of goods with a condition that in case of a breach of any term of the contract or if the buyer is not satisfied with the goods the buyer may return the goods and recover the price paid. This condition entitles the buyer in case of such breach to rescind the contract which he could not do after acceptance without such a condition except with the consent of the seller or in a case of fraud.³ He must however return the goods as soon as he reasonably can after discovery of the breach of contract; but if the contract provides a limited time for the return of the goods, he may do so at any time within the limit.⁴ He is entitled to the full time although he has said that the price does not suit him if he retains possession,⁵ but if no time is fixed, a statement that he will not pay the price determines the delivery,⁶ but after the time limited which runs *prima facie* from the actual receipt and not from the date of despatch,⁷ the condition ceases, even if a breach of the contract existed during the time and was not discovered until after it⁸: and thus such a clause restricts the

§ 530.
Right given
to return
goods.

Latent
defect.

¹ *Behn v. Burness*, (1863) 32 L.J. Q.B. 204.

² Smith's M. L., 11th Ed. 689.

³ See S. of G. Act, s. 53.

⁴ *Head v. Tattersall*, (1871) L. R. 7 Ex. 7, 41 L.J. Ex. 4.

⁵ *Ellis v. Mortimer*, (1805) 1 B. & P. N.R. 257; *Elphick v. Barnes*, (1880) 5 C.P.D. p. 324.

⁶ *Bradley v. Ramsay*, 28 T. L.

R. 13.

⁷ *Jacobs v. Harback*, (1885) 2 T.L.R. 419.

⁸ *Bywater v. Richardson*, (1834) 1 A. & E. 508; *Smart v. Hyde*, (1841) 10 L.J. Ex. 479; *Chapman v. Gwyther*, (1866) 35 L.J. Q.B. 142; *Chapman v. Withers*, 57 L.J. Q.B. 457 (1888) 20 Q.B. 824.

§ 530. usual rule that the buyer has a reasonable time after discovery of the defect in which to repudiate the contract.¹

Return the only remedy. The contract may be such that the buyer's only remedy is to return the chattel,² and then if the buyer rejects the goods and offers to return them on payment of freight the ensuing delay may prevent him from returning them at all.³

And the option to reject goods may be subject to any special provisions of the contract or any trade usage.⁴

§ 531. **Parties cannot by breach of a warranty or condition annul the contract.** Neither the vendor nor the vendee can by his own act or default defeat the obligations which he has undertaken to fulfil,⁵ although it may have been stipulated, or even enacted, that the contract on breach of any condition shall be null and void, for that means void at the election of the other party.⁶

The right to abandon a contract vests only in the party, who has not been guilty of any default : for a man cannot take advantage of his own wrong in order to put an end to a contract into which he has entered,⁷ but if default has been waived, it is immaterial.⁸

Meaning of rescission. In the strict sense of the term a contract cannot be rescinded without the consent of both parties, and a mere intimation by one party of his intention not to perform his promise does not discharge the contract unless the other party elects to treat it as a repudiation of the contract.⁹

¹ But the seller's conduct if it induces delay extends the time for rejection, *see* § 621.

² *Hinchcliffe v. Barwick*, (1880) 5 Ex. D. 177.

³ *Ornstein v. Alexandra*, (1896) 12 T.L.R. 128.

⁴ *Haridas Khandilwal v. Kalumull*, (1908) 30 C. 649 O. C.

⁵ *Sailing Ship Blairmore v. Macredie*, (1898) A.C. p. 607.

⁶ *Hughes v. Palmer*, (1865) 19 C. B. N. S. 393, 407; *Malins v. Freeman*, (1838) 4 Bing. N. C. 895; *Holme v. Guppy*, (1838) 3 M. & W. 387; *Thornhill v. Neats*, (1860) 8 C. B. N. S. 831.

⁷ Chitty, 11th Ed. 421.

⁸ *Braithwaite v. Foreign Hard Wood Co.*, (1905) 2 K. B. 543 C. A.

⁹ *Michael v. Hart*, (1902) 1 K. B. 482 C. A.

Apart from all special agreements express or implied, and cases where the rights of the parties are modified by repudiation or waiver,¹ the Common Law rule was that all conditions must be fully performed whether relating to time,² quantity³ or quality.

§ 532.
Strict performance necessary.

Part performance is of no avail unless the contract is severable³ or unless by accepting it the promisee waives the condition.⁴

Part performance.

Generally performance must be according to the contract and not merely reasonable, but where in a contract the manner, place or time of performance is left undefined,⁵ and no trade usage⁶ or implied term⁷ is applicable, there is one general rule which applies, that is, that performance must be in a reasonable manner and with reasonable diligence on each side.⁸ What is reasonable is to be determined by the actual circumstances.⁹ But impediments which the party has himself created or which are under his control, are not excuses for delay.¹⁰

Reasonable performance.

Indefinite terms.

¹ The Common Law rule as to conditions becoming equal to warranties where the property had passed depended on waiver by acceptance of substantial part performance.

² *Bowes v. Shand*, (1877) 2 A. C. 455 H. L.

³ *Wilson v. London, etc., Co.*, (1865) L. R. 1 P. C. 61; *Wilkinson v. Clements*, (1872) 8 Ch. Ap. 96.

⁴ See § 557.

⁵ Where the time stated is not construed as of the essence of the contract, still performance must be in reasonable time: *Kishan Prasad Sinha v. Purnendu*, (1912) 15 C. L. J. 40, if not the other party may rescind the contract.

⁶ See § 71.

⁷ See § 62.

⁸ *Dahl v. Nelson*, 6 A. C. p. 59.

⁹ *Postlewaite v. Freeland*, (1880) 5 A. C. p. 621; *Hick v. Raymond*, (1893) A. C. 22; *Hick v. Rodocanachi*, (1891) 2 Q. B. 626, 638, 646; *Carlton v. Castle*, (1898) A.C. 486; *Hick v. Tweedy*, (1891) 63 L. T. 765; *Ford v. Colesworth*, L. R. 5 Q. B. p. 548 (due diligence on both sides); *Lyle Shipping Co. v. Cardiff*, (1900) 2 Q. B. 638; in *U.S. Empire Trans. Co. v. Philadelphia*, (1896) 77 Fed. R. 199.

¹⁰ *Zillah Shipping Co. v. M. Ry.*, (1902) 19 T.L.R. 63; *Hick v. Rodocanachi*, (1891) 2 Q. B. p. 645; *Ford v. Colesworth*, L.R. 4 Q.B. p. 137; *Nelson v. Dahl*, 12 Ch. D. p. 583; but see *Hill v. Idle*, (1815) 4 Camp. 327.

§ 532. Reasonable diligence must be continuous not average performance. diligence.¹

Trade practices. What is reasonable may not only be determined by trade usage but by trade practices which need not be invariable.²

Course of business. So where it is necessary to imply some term and no rule of law applies, a usual practice or course of business which the parties may be presumed to have known and with reference to which it is reasonable to suppose they contracted, becomes material to show their intention though it is not a definite or uniform practice.³

§ 533. Contracts for delivery by instalments. There is however a class of cases to which the strict rules of performance are not applied, although the terms of the contract are explicit, namely contracts for deliveries by instalments.

Reason for exceptional treatment. The reason⁴ for the exceptional treatment of an instalment contract is that it is construed as a promise to do several acts, and therefore a failure or a partial failure to perform one of the acts, that is as to one instalment, is presumed⁵ not to go to the root of the contract,⁶ unless the contrary is shown, and that the true construction is that entire performance is not a condition precedent in such

¹ *Aberdeen Co. v. Macken*, (1899) 2 I. R. 1; *Avoan S. S. Co. v. Leask*, 18 Sess. A. (4th) 280.

² *DaCosta v. Edmunds*, 4 Camp. 142 (customary stowage); *Gould v. Oliver*, 2 Man. & Gr. p. 236; *Cuthbert v. Cumming*, 24 L.J. Ex. 198, 310; *Duckett v. Satterfield*, L. R. 3 C. P. 227; *Haynes v. Holliday*, 7 Bing. 587; *Smith v. Rosario Nitrate Co.*, (1894) 1 Q. B. 174; *Nielsen v. Wait*, (1885) 14 Q. B. D. 516.

³ *Lewis v. G. W. Ry.*, 3 Q. B. D. 195 (owner's risk—course of business). *The Curfew*, (1891) P. 131,

but see *The Nifu*, (1892) P. 411; *Walker v. Johnson*, 10 M. & W. 161; *Hatts v. Grant*, 26 Sc. L. R. 660; *Dickenson v. Lano*, 2 F. & F. 188.

⁴ It has been held that a refusal to accept one instalment is a refusal to perform part and not the whole of the contract: *Dickenson v. Fanshaw*, (1892) 8 T.L.R. 271 C. A.

⁵ It is not a rule of law, see p. 511 *infra*.

⁶ See *per* Blackburn L. J. in *Mersey Co. v. Naylor*, (1884) 9 A.C. 434; *Reuter v. Sala*, (1879) 4 C. P. D. 239, 246, 257.

contracts.¹ In other words, as Benjamin suggests,² the general rule that a seller must deliver the full quantity contracted for and must ship at the stipulated time and place and that all terms as to payment, declarations and the like must be strictly performed,³ is modified by presuming an intention from the very fact of the provision for instalments, especially where they are to be separately paid for, that the consideration for the promise of either party shall be treated as so far divisible that a partial breach by either shall be compensated for by damages unless it can in fact be shown to go to the root of the contract.² Or as it has been held in India, it is to be assumed that the parties intended that each of such instalments was to be treated separately and that failure as regards one should be compensated for separately.⁴

§ 533.
Reason for exceptional treatment.

Such contracts may however, if that appears to be the intention of the parties, be construed⁵ as an entire contract for a lump sum⁶ for an entire quantity,⁷ or the intention may be that each instalment is quoad the contract a separate contract⁵ and if the goods ordered must each be of a particular standard it may be intended as a separate contract for each item.⁸ But although the contract is entire so that failure to perform part gives a right of action, yet it may not be so entire that a failure to perform every part of the promise in relation to one instalment renders the whole contract voidable.⁹ It is this

§ 534.
Possible methods of construing.

¹ *Per* Brett L.J.: *Reuter v. Sala*, 48 L. J. C. P. p. 503, approved in *Jackson v. Rotax Co.*, (1910) 80 L. J. Q. B. 38.

² 5th Ed. 728.

³ *Bowes v. Shand*, (1877) 2 A.C. 455 H. L.

⁴ *Per* Sale J. in *Rash Behary Shaha v. Nritya*, (1906) 33 C. 477.

⁵ *Jackson v. Rotax Co.*, (1910)

80 L. J. K. B. 38 C. A.

⁶ Farwell J. seemed to consider this unnecessary; *ibid.*

⁷ *Ibid.* see § 535.

⁸ *Ibid.*; where that method was not adopted; see *Molling v. Dean*, (1902) 18 T. L. R. 217.

⁹ *Mersey Steel Co. v. Naylor*, (1884) 9 A. C. 434 H. L., where the first two methods of construing were held to be possible.

§ 534. feature of such contracts that renders their construction difficult.

Entire contract.

The first point to decide is whether the contract belongs to the class of entire contracts for entire quantities. If it does, a failure to deliver any part of an instalment is a breach justifying repudiation, and similarly a breach as to the time of delivery or payment would be a breach justifying repudiation.

Divisible.

If it does not belong to that class it may still be an entire contract and yet any breach will, unless it is such as to evince an intention to be no longer bound by the contract, only give rise to a claim for damages.

If it is a divisible contract the failure to perform only affects the other party so as to afford an answer to any claim for performance of any promise which was concurrent with that broken, and to give rise to a claim for damages.

Entire or not.

Whether a contract is entire or not must be determined on consideration of all the circumstances. The fact that delivery is to be by instalments, or that the goods are of different kinds¹ or that some of the goods are future goods,² or that they are sold at different prices³ does not make the contract divisible.

Generally a contract is entire if it is to be presumed that one article would not have been sold at one stipulated price unless the others had been sold at the other prices.¹ The fact that the price is a lump sum or that the whole quantity was ordered at one time or is included in one account *primâ facie* shows that the contract is entire. Whereas orders given at different times and the fact that some goods are bought outright and others conditionally show that it is divisible.⁴

¹ *Elliott v. Thomas*, (1838) 3 M. & W. p. 176.

² *Baldev v. Parker*, (1823) 2 B. & C. 37.

³ *Scott v. Eastern Counties Ry. Co.*, (1843) 12 M. & W. 33; *Bigg v. Whisking*, (1853) 14 C. B. 195.

⁴ *Price v. Lea*, (1823) 1 B. & C. 156.

A party who accepts part of the goods under an entire contract cannot set up that it was entire.¹

§ 534.

Part acceptance.

It seems that according to the English view a contract is not entire for an entire quantity, unless it is stipulated or to be inferred that no part of the consideration is payable until complete performance,² that is that complete delivery according to the terms of the contract is a condition precedent to payment of the price or any part of it.

Entire for entire quantity.

In England where no part of the price is payable until all the instalments are delivered,³ the buyer has the right, the agreement being for an entire contract for a specified quantity, to return any instalments received if the entire quantity is not delivered,⁴ but if he, after the seller has failed to make a complete delivery of the entire quantity, retains any part he must pay its value and cannot resist payment until the entire quantity is delivered.⁴ In such a case the seller cannot sue for the price or any part of it until the time for delivery has expired, for until then it is not certain that the seller's failure to deliver the rest will not entitle the buyer to reject the part received.⁵

§ 535.
Entire contract.

Where no part of price payable until entire delivery.

It has been said that in such cases acceptance apart from mere receipt of the first instalments precludes rejection of the rest.⁶

It seems that a right to reject the instalments delivered also arises although each instalment is to be separately

Where entire quantity an indivisible whole.

¹ *Champion v. Short*, (1807) 1 Camp. 53; *Baldry v. Parker*, 1 L. J. (o.s.) K. B. 229.

² Cf. *Adlard v. Booth*, (1835) 7 C. & P. 108; *Hopkins v. Prescott*, (1847) 4 C. B. 578.

³ *Jackson v. Rotax Co.*, (1910) 80 L. J. K. B. 38, where Cozens-Hardy L. J. supports the proviso, but Farwell L. J. does not.

⁴ *Oxendale v. Wetherell*, (1829) 9 B. & C. p. 387, approved by P.C. in *Colonial Ins. Co. v. Adelaide Ins. Co.*, (1886) 12 A. C. pp. 138, 140.

⁵ *Waddington v. Oliver*, (1805) 2 B. & P. N. R. 61.

⁶ *Jackson v. Rotax Co.*, (1910) 80 L. J. K. B. 38, but see § 560.

§ 535. paid for, if the failure to deliver the rest goes to the root of the contract, *e.g.*, where the entire quantity is an indivisible whole, as a book.¹ In such a case any part payment is recoverable.¹

§ 536.
Construed
as separate
contracts.

In the absence of special circumstances the view generally adopted is that the contract, though entire so that a failure to deliver all gives a cause of action for non-delivery, is yet so far severable that each instalment is treated as a separate contract or, to use more precise language, there is an entire contract for the whole quantity, but it is divisible in performance.² But this *prima facie* presumption is not so far established as to be beyond controversy in England. The decisions have not been harmonious, and one learned author has expressed a strong opinion that it is only as regards the time of payment that any latitude of performance is allowed,³ approving the American decision in *Norrington v. Wright*.⁴ In that case the Court approved of *Hoare v. Rennie*,⁵ and after reviewing all the English authorities held that the time and quantity of each delivery were of the essence of such contracts, relying on *Bowes v. Shand*,⁶ which was said not to conflict with *Mersey Steel Co. v. Naylor*,⁷ as the latter case only dealt with a failure to pay in time.

Terms other
than pay-
ment.

This distinction however does not seem to have found any other support in England,⁸ and it seems that the real

¹ Benj. 5th Ed. 697, but a contract for twenty-four numbers of a periodical work has been held to be separable: *Mavor v. Pyne*, (1825) 3 Bing. 285.

² *Mersey Steel Co. v. Naylor*, (1884) 9 A. C. p. 439; *Honck v. Muller*, (1881) 7 Q. B. D. p. 100.

³ Pollock on 'Contract,' 8th Ed. 756 and see Chitty, 15th Ed. 721.

⁴ (1885) 115 U. S. 188, but see § 540.

⁵ (1859) 29 L. J. Ex. 73, not followed in *Simpson v. Crippin*, (1872) 42 L. J. Q. B. 28, approved

in *Honck v. Muller*, (1881) 7 Q.B. D. 92 C. A.

⁶ (1877) 2 A. C. 455.

⁷ (1884) 9 A. C. 434.

⁸ See *Rhymney Ry. v. Brecon*, (1900) 83 L. T. p. 117, 69 L. J. Ch. 813, C. A.; *Jackson v. Rotax Co.*, (1910) 80 L. J. K. B. 38 C. A.; *General Bill Posting Co. v. Atkinson*, (1909) A. C. 118 H. L., and per Collins L. J. in *Cornwall v. Henson*, (1900) 2 Ch. 308 C. A., but see § 537, where *Mersey Steel Co. v. Naylor* is set out.

distinction between *Bowes v. Shand* and *Mersey Steel Co. v. Naylor* is that the former did not relate to an instalment contract.¹ § 536.

The Sale of Goods Act draws a distinction between pre-
 sumptions as to the time of payment and other terms of a
 contract in section 10 (1) and by section 30 (1) expressly
 enacts that a delivery of less than the contract quantity
 entitles a buyer to reject, but treats all terms as depending
 on the circumstances in the case of contracts for delivery by
 stated instalments to be paid for separately in section 31 (2);
 though by limiting that section to particular forms of such
 contracts, the construction of other forms is left in doubt.² Sale of Goods Act.

The Contract Act has not provided expressly for the
 method of construing such contracts. Section 39 lays
 down that a contract must be performed in its entirety.
 But probably this does not apply to instalment contracts
 which are governed by the intention of the parties,³
 though it is a section of doubtful import,³ and has been
 construed as meaning a refusal which affects a vital part
 of the contract and prevents the promisee from getting in
 substance what he bargained for.⁴ Indian Rule. Section 39.

Section 55 provides that time is only of the essence of a
 contract, if that is the intention of the parties, and in this
 respect modifies section 39. Section 51 provides that reci-
 procal promises to be simultaneously performed need not
 be performed unless the other party is ready and willing to
 perform his part, but as the question is whether an instal-
 ment contract is to be construed as a series of separate
 reciprocal promises or as one entire reciprocal promise,
 this section throws no light on the point. The result is Sections 51, 55.

¹ See Benj. 5th Ed. 736.

² See Benj. 5th Ed. 729.

³ *Sooltan Chand v. Schiller*,
 (1878) 4 C. 252 per Markby J.

⁴ *Ibid.* per Garth C. J. and see
Simson v. Virayya, 9 M. 358; Vol-

kart Bros. v. Rutnavelu, 18 M. 63;
Rash Behary Shaha v. Nrittya
Gopal Nundy, (1906) 83 C. 477,
 relying on *Freeth v. Burr*, (1874)
 L.R. 9 C.P. 208, and *Mersey Steel*
Co. v. Naylor, (1884) 9 A. C. 434.

§ 536. that the whole method of construction depends on the general law.¹

Each instalment a distinct contract.

The view taken has been that each instalment is to be treated as a distinct contract² and though failure to pay for one instalment may justify non-delivery thereof, it will not, unless such failure go to the root of the whole contract, justify a repudiation of the rest of the contract.³ But for each breach of the contract to deliver or accept any instalment an action lies at once⁴ and where the contract provided that each instalment should be treated as a separate contract, it was held that the seller might bring separate suits as to separate instalments.⁵

Damages for each breach.

Indian view.

It seems then that the Indian Courts accept the view that *primâ facie* a failure whether in delivery, acceptance or payment in respect to one instalment is not a ground for repudiation of the whole contract, but it may be shown to have been the intention of the parties that it should be so, and it is so if the failure to perform evinces an intention no longer to be bound by the contract.

§ 537. Points to be considered. Are any terms made essential.

In considering a contract for delivery by instalments the first question is, have the parties made exact performance of all or any of its terms of the essence of their bargain, as they may do,⁶ though owing to the prevailing method of construing such contracts it seems that express words are necessary. Then the enquiry is whether delivery of the entire quantity is an essential term or merely a collateral undertaking.⁷ This may be inferred from the circumstances.⁸ If any essential term is not strictly per-

¹ See *Clemens v. Biddell*, (1911) 28 L. T. R. 42 H. L.

² *Cooverjee Bhojee v. R. N. Mookerjee*, (1909) 36 C. 617.

³ *Rash Behary Shaha v. Nitya Gopal*, (1906) 33 C. 477 (failure to pay).

⁴ *Dickinson v. Fanshawe*, (1892) 8 T. L. R. 271 C. A.

⁵ *Volkart v. Sabju*, (1896) 19

M. 304, *sed quære*.

⁶ *Ebbw Vale Steel Co. v. Blaina*, (1901) 6 Com. Cas. 38 C.A. (punctual payment); see *per* Selborne L. C. in *Mersey Steel Co. v. Naylor*, (1884) 9 A. C. 434.

⁷ See § 534.

⁸ *Colonial Insurance Co. v. Adelaide Insurance Co.*, (1886) 12 A. C. 128, 138, 140.

formed the other party may put an end to the contract.¹ But if exact performance of any term is not essential, a breach thereof will, if an intention is thereby evinced by the party in default no longer to be bound by the contract, justify a repudiation of the rest of the contract by the other party.² This is a difficult question of fact.

§ 537.
What terms
are essen-
tial.

In the House of Lords the decision in *Mersey Steel Co. v. Naylor*³ turned on several points. Selborne, L. C., confined his decision to the facts of the case,⁴ and showed that there the breach was not of a condition precedent, if it had been, of course, there would be an end of the case.⁵ His view was that the payment had to be made after delivery, and was therefore not a condition precedent in the absence of express words.

*Mersey Steel
Co. v. Naylor.*

Blackburn, L. J., laid the law down broadly that it is not every breach which goes to the root of a contract : but it depends on the contract. Watson, L. J., also held that any departure whatever from the terms of a contract by one of the parties was not sufficient to entitle the other to set it aside.

In a later case in the Appeal Court, Collins, L. J., said, referring to an instalment contract : " The law is clear that the breach of one stipulation in a contract does not of itself amount to an entire repudiation of the contract. Whatever doubt as to this may have arisen from a comparison of such cases as *Withers v. Reynolds*,⁶ *Hoarc v. Rennie*,⁷

*Cornwall v.
Henson.*

¹ *Ebbw Vale Steel Co. v. Blaina*, (1901) 6 Com. Cas. 38 C.A. (punctual payment) ; see *per* Selborne L.C. in *Mersey Steel Co. v. Naylor*, (1884) 3 A. C. 434.

² *Freeth v. Burr*, (1874) L. R. 9 C. P. 208 ; *General Billposting Co. v. Atkinson*, (1909) A.C. 118 H. L.

³ (1884) 9 A. C. 434 (failure to pay where instalments to be paid for separately).

⁴ This would leave the case of failure to deliver open ; see § 536.

⁵ *Ibid.* p. 439.

⁶ (1881) 2 B. & Ad. 852 (refusal to pay held to justify repudiation time being of the essence) approved in *Mersey v. Naylor*.

⁷ (1859) 29 L. J. Ex. 73 (failure to deliver held sufficient) explained as a case where time was of the essence in *Jonassohn v. Young*, (1863) 32 L. J. Q. B. 385 ; see *Coddington v. Paleologo*, (1867) 36 L. J. Ex. 73.

§ 537. *Honck v. Muller*¹ and *Simpson v. Crippin*,² has been set at rest by *Mersey Steel Co. v. Naylor*.³ The question was fully considered by the House of Lords in the latter case and the law is now clear that the breach of one stipulation does not necessarily carry with it even an implication of an intention to repudiate the whole contract. It may do so if the circumstances lead to such an inference, but the further the parties have proceeded in performance of the contract the less likely is it that by breach of one stipulation by one party he should intend to declare his incapacity to perform his contract or his intention not to carry it out.”⁴

The case was that of the purchase of land ; payment to be made in a number of instalments spread over a long period : all the instalments but one were paid ; and the purchaser had possession of the land ; he then disappeared : and after a long time, the seller having repeatedly tried to obtain his money, rescinded the contract and resold the land : it was held that he had no right to do so. Webster, M.R., seems to have thought that the case might have been different had the seller given notice that on failure to pay he would treat the contract as abandoned.⁵

Distinction
between
cases of
absolute
refusal and
refusal infer-
red from
conduct.
Express
refusal.
Inferred
refusal.

Shortly afterwards the same Court⁶ in a written judgment laid it down that if there has been a distinct refusal to be bound by the contract in the future, the other party may treat it as at an end. Short of such refusal, the true principle is to ascertain whether the action of the party who is breaking the contract is such that the other party is entitled to conclude that the party breaking the contract no longer intends to be bound by its provisions ; for this

¹ (1881) 50 L. J. Q. B. 529
(failure to deliver sufficient).

² (1872) 42 L. J. Q. B. 28 (fail-
ure to deliver not sufficient).

³ (1882) 9 A. C. 434.

⁴ *Cornwall v. Henson*, (1900)
Ch. 298, 303 C. A.

⁵ See § 541.

⁶ *Rhymney Ry. v. Brecon*, (1900)
L. J. Ch. 813 C. A. (a case of a
contract with many terms).

purpose the failure to perform must go to the root of the contract, and it is going too far to hold that however little remains to be performed, if it is to be gathered from the facts that one party does not intend to fulfil his obligation to perform that part, the other is justified in treating the contract as wholly determined.

§ 537.
Whether it must relate to an essential part.

But this does not seem to be a sound view, for a failure to perform an essential part of a contract gives a right to repudiate without inferring any intention not to be bound by the contract. And it has been since laid down that a breach by one party in connection with one instalment may be of such a kind or take place in such circumstances as reasonably to lead to the inference that similar breaches will be committed in relation to subsequent instalments. In such a case the whole contract may be repudiated without waiting to see what happens as to future instalments. If, for instance, the buyer fails to pay for one delivery in such circumstances as to lead to an inference that he will not pay for subsequent deliveries; or if the seller delivers goods differing from the requirements of the contract and does so in circumstances that lead to the inference that he cannot or will not deliver any other kind of goods in the future, the other party may at once cancel the whole contract.¹

If failure in respect of one delivery raises inference of similar failures in respect of the rest, no need to wait.

Bingham, J., said it is a well-known rule of law that where goods are sold to be delivered by instalments a breach by one party in connection with one instalment does not of itself entitle the other party to rescind the contract as to the other instalments. But this rule, which is a very good one, is like most rules subject to qualification.²

Said to be a rule of law.

Walton, J., however, in the same case³ said he could find no such statement of law : and that seems to be correct.⁴

But not so.

¹ *Millars v. Weddell*, (1909) 100 L. T. 128, 14 Com. Cas. 25, 11 Asp. M.C. 184 Div. Ct.

² *Per* Bingham, J., *ibid.*

³ *Ibid.* p. 31.

⁴ See *per* Bowen, L.J., in *Mersey Steel Co. v. Naylor*, (1882) 9 Q.B. D. p. 670.

§ 537. This view seems to be that a failure to perform, which of itself does not go to the root of the contract may if re-enforced by an inference that subsequent similar failures are intended, give rise to a right to avoid. The rule seems then to be that a failure to perform a term which does not go to the root of the contract, does not amount to a repudiation of the contract unless it raises an inference that similar subsequent failures will occur. For the parties cannot intend that an indefinite number of breaches should be compensated for by damages.

Rule to be deduced.

§ 538. There is no absolute rule which can be laid down in express terms as to what breach will exonerate the other party from performing his part of the contract.¹ Any breach might under the particular circumstances be sufficient.² The suggested test is whether the party has evinced an intention no longer to be bound by his contract.³ The following circumstances have been held in the particular circumstances not to evince such an intention, a failure to pay at the contract time,⁴ a failure to deliver the correct quantity at the contract time,⁵

Breaches amounting to repudiation.

Test.

¹ *Mersey Steel Co. v. Naylor*, (1882) 9 Q. B. D. 648 per Jessel, M. R.

² *Ibid.* per Bowen, L. J.

³ *Ibid.* per H. L., (1884) 9 A. C. 434, and see § 554. This test only applies where the failure relates to a non-essential term, for if it relates to an essential term a failure to amount to repudiation need not be wilful in the sense of being intentional: *Measures v. M.*, (1910) 3 Ch. 248; see § 554. In fact the word intention seems to be misleading. The rights of parties do not depend on the intention with which a breach is committed. A failure to perform is not excused because it was caused by misfortune unless the contract so

provides: *Measures v. M.*, supra. It is certainly sufficient to show that a party so acted as to show that he could not fulfil the rest of the contract; (but see § 549) and failing that is enough to show that he evinced an intention not to perform.

⁴ *Ibid.* but it might do so: *Booth v. Bowron*, (1892) 8 T. L. R. 641; cf. *Withers v. Reynolds*, 1 L. J. K. B. 30 (refusal to pay); *Simpson v. Virayya*, 9 M. 359.

⁵ *Dickinson v. Fanshawe*, (1892) 8 T. L. R. 271 C. A.; *Simpson v. Crippen*, (1872) 42 L. J. Q. B. 28, and for an opposite inference, see *Hoare v. Rennie*, (1859) 29 L. J. Ex. 73; *Honch v. Muller*, (1881) 50 L. J. Q. B. 529.

delivery of inferior goods,¹ a threat not to proceed with the contract,² a refusal to accept one instalment,³ and the detention of the buyer's barges sent to fetch the goods.³

§ 538.
What
amounts to
repudiation.

The effect of insolvency has been discussed already.⁴ A seller has no right to the continuous solvency of his buyer and must deliver under an instalment contract as long as he is paid⁵; even liquidation of a company coupled with assignment of the contract does not determine a contract.⁵

Insolvency.

But even in the case of instalment contracts the effect of a failure to deliver the first instalment at all or a delivery of a quantity less than that agreed upon as the first instalment, is open to doubt. There is a remarkable conflict of authority,⁶ but Benjamin⁷ considers that a substantial breach of contract at the outset of the performance thereof may afford a ground for repudiation and where two instalments had to be delivered, and an arbitrator found the inferiority of the first instalment to be of such a character as to amount to a repudiation of the contract, the Court refused to disturb his finding.⁸ Bramwell, L. J., considered that the question turned on whether there had been part performance,⁹ apparently substantial part performance,

§ 539.
Failure as
regards
first instal-
ment.

Part
performance.

¹ *Jonassohn v. Young*, (1868) 32 L. J. Q. B. 835; see *Millars v. Widdell*, (1909) 14 Com. Cas. 25 for a different inference.

² *Dickinson v. Fanshaw*, (1892) 8 T. L. R. 271 C. A., but there is no other authority that an absolute refusal is not enough and the dictum was *obiter*.

³ *Dickinson v. Fanshaw*, *supra*; *Jonassohn v. Young*, *supra*.

⁴ § 240.

⁵ *Tolhurst v. Ass. Cement Manu. Co.*, (1902) 2 K. B. 660, *aff. A. C.* 414.

⁶ *Honck v. Muller*, (1881) 4 Q. B. D. 92 C. A., approving *Hoare v. Rennie*, (1859) 29 L. J. Ex. 73, *contra Simpson v. Crippin*,

(1872) L. R. 8 Q. B. 14, 42; L. J. Q. B. 28 C. A., refusing to follow *Hoare v. Rennie*; *Freeth v. Burr*, (1874) L. R. 9 C. P. 208, followed in *Simson v. Viragga*, (1886) 9 M. 359.

⁷ Benjamin 5th Ed. 728; *cf.* in Pollock Indian Contract Act, 2nd Ed. p. 244, so held in *America Norrington v. Wright*, (1885) 115, U. S. 981.

⁸ *Millars v. Weddel*, (1908) 14 Com. Cas. 25, 100 L. T. 128.

⁹ *Honck v. Muller*, (1881) 4 Q. B. D. 92 C. A., but see his explanation in *Mersey Steel Co. v. Naylor*, (1884) 9 A. C. 434. See *Cornwall v. Henson*, (1900) 2 Ch. p. 308.

§ 539.
After part
performance.

but the House of Lords has recently ruled that if there is a repudiation of the contract, the other party may in spite of substantial part performance, rescind it,¹ but the inference of an intention to repudiate will be less likely the further the parties have proceeded with their contract.²

§ 540.
American
view.

The American view³ is that in England instalment contracts are construed as severable,⁴ and therefore a breach as to one is not vital. Whereas in America they are regarded as entire and therefore a material breach as to one instalment justifies repudiation.⁵ But the authorities are conflicting³. Benjamin⁶ says the weight of authority in America is in favour of the English rule that in the absence of an express refusal, a rescission of a divisible contract will not be allowed for a breach thereof unless such breach goes to the whole consideration. But he admits the decisions are conflicting, and the view of an American writer³ is entitled to more weight.

§ 541.
Effect of
giving
notice of
time limit.

According to Addison⁷ whether a party insisting on performance can by notice to the party in default specify a time within which the contract must be performed or rescinded, would seem to depend upon whether the property had passed or not at the time of the notice⁸; if it has not passed, it would seem that such notice would be effective provided a reasonable time was allowed.⁹

¹ *General Bill Posting Co. v. Atkinson*, (1909) A. C. 118, and see per C. A. in *Mersey Steel Co. v. Naylor*, (1882) 9 Q. B. D. 648.

² *Cornwall v. Henson*, (1900) 2 Ch. 298, 303 C. A.; see ante p. 724.

³ Parsons 9th Ed. Vol. II 673.

⁴ See per Thesiger. L. J., in *Reuter v. Sala*, (1879) 4 C. P. D. p. 246; "each delivery is really like a delivery under a separate contract": this is also the Indian view, see § 536.

⁵ *Norrington v. Wright*, (1885) 115 U. S. 188; *Cleveland v. Rhodes*, (1886) 121 U. S. 255.

⁶ 5th Ed. 734, citing *Myer v. Wheeler*, (1884) 65, Iowa p. 396.

⁷ 10th Ed. 504. This seems to be only an equitable doctrine, see § 67.

⁸ Citing *Martindale v. Smith*, (1841) 1 Q. B. 389, 10 L. J. Q. B. 155.

⁹ *Parkin v. Thorold*, 16 Beav. 59, (1852) 22 L. J. Ch. 170, where the rule laid down was that such a notice would prevent the other party obtaining specific performance: *Crawford v. Toogood*, (1879) 49 L. J. Ch. 108, 13 Ch. D. 153; see chapter on Interpretation of Contracts under Time.

But it is difficult to see why a party may, by such notice, acquire a right which the contract does not give him. In *Mersey Steel Co. v. Naylor*,¹ the sellers gave such a notice, but no such rule as suggested above was referred to by the House of Lords in their decision. But of course a contract does not contemplate any unreasonable delay, and if the delay is excessive, the other party can repudiate it, and the fact that he has, as regards previous instalments, accepted payment though long overdue under protest, does not affect his right.² The only effect of notice seems to be that it shows *bonâ fide* conduct in the matter.

§ 541.
Effect of
giving
notice of
time limit.

It will be seen from the above discussion that the rules as to instalment contracts are very unsatisfactory. In England the Sale of Goods Act has not thrown any light on the subject. Pollock suggests it makes the test not the intention but the result³; but this method of construing mercantile contracts has since been condemned in the House of Lords.⁴

Rule unsatisfactory.

The result is that in such contracts whether a breach justifies repudiation is a difficult question of fact, unless the parties have expressly stipulated that all the terms are to be of the essence of the contract.

Question of fact.

Where the breach would justify a repudiation of the whole contract, the promisee has the option of continuing the contract,⁵ and suing merely for the particular breach.

Option to continue.

Once it is determined that a stipulation is a condition precedent, the rule is very general and uniform⁶ that

§ 542.
Performance of conditions precedent,

¹ (1884) 9 A. C., similarly unnoticed in *Rash Behary Shaha v. Nrithya Gopal Nundy*, (1906) 33 C. 477; see however remarks of M. R. in *Cornwall v. Henson*, (1900) 2 Ch. 298 C. A., which related to a purchase of land, and see § 67, as to the effect of such notice after unreasonable delay in contracts for the purchase of land.

² *Booth v. Bowron*, (1892) 8

T. L. R. 641.

³ On contracts 8th Ed. 268.

⁴ *Wallis v. Pratt*, (1911) A. C. 394.

⁵ *Workman v. Lloyd*, (1908) 1 K.B. 968, 977; 77 L.J. K.B. 953.

⁶ Benjamin, 5th Ed.; see Laws of England. Vol. VII. p. 436 para. 891; Cf. *South British F. & M. Ins. Co. v. Brojo N. Shaha*, (1909) 36 C. p. 581.

§ 542. unless waived a condition precedent must be fully and strictly performed before the party on whom its fulfilment is incumbent can call on the other to comply with his promise.

Performance of conditions. This rule of English Law seems to have been adopted in section 51 of the Contract Act.¹ Partial performance is not enough unless the condition and promise are made divisible and apportionable as in the case of a contract for the delivery of goods or any portion thereof.²

Partial performance. The promisee must prove performance or an excuse for non-performance of a condition precedent incumbent on him.³ But although subsequent acts are not admissible to vary the terms of a contract they may prevent one of the parties from insisting in a strict performance of the original agreement.⁴ But the motive inducing the promisee to repudiate a contract on breach of a condition is immaterial.⁵

Onus of proof. The same rule applies to concurrent conditions ; the party complaining of a breach must show as a matter of law that he has performed all that was incident to his part of the concurrent obligations.⁶

Motive for repudiation. A condition precedent may be waived by the party in whose sole favour it has been made and the other party in such a case must fulfil his part of the contract.⁷

Concurrent conditions.

§ 543.
Condition may be waived expressly.

¹ See *Buldeo Doss v. Howe*, (1880) 6 C. 64 per Garth, C.J.

² *Wilson v. London Navigation Co.*, (1865) L.R. 1. C.P. 61; *Wilkinson v. Clements*, (1872) 8 Ch. Ap. 96; see *United Shoe Manu. Co. v. Brunet*, (1909) 25 T.L.R. 442.

³ *Clack v. Wood*, 9 Q.B.D. 276; *Heurd v. Wadham*, 1 East. 631; see § 555. This has been held to be so as regards the "warranties" in a marine insurance Policy : *South British F. & M. Ins.*

Co. v. Brij Nath Shaha, (1909) 88 C. 516, 532, 539; but it seems in England this is not so: Arnould 8th Ed. 1549; *Thompson v. Weins*, (1884) 9 A.C. 691.

⁴ *Bruner v. Moore*, (1904) 1 Ch. 305; *Hughes v. Metro. Ry.*, (1877) 2 Ap. Ca. 439.

⁵ *Oceanic S.N. Co. v. Sooderdus*, (1890) 15 B. 389.

⁶ *Forrest v. Armayo*, (1900) 88 L. T. 385 C. A.; *Shand v. Atmakuri*, 2 M. 193.

⁷ See § 546.

Such waiver may be express, for which proposition no authority is required,¹ or there may be a tacit waiver by inference from the acts or conduct of the promisee ; or there may be waiver by implication of law.

§ 543.

Or tacitly.

Or by implication of law.

The onus of proving a waiver is on the party asserting it.²

Onus of proving a waiver.

Where a contract provides for a series of acts, waiver of strict performance of one of such acts does not amount to a similar waiver in respect of all the rest nor does it carry with it any such implication. It has been held that in a contract for the sale of land to be paid for by instalments the seller after not insisting on punctual payment of two instalments could not on failure to pay three subsequent instalments avail himself of a right under the contract to avoid it for such default without having given notice of his intention to do so.³ The Court cited *Cornwall v. Henson*⁴ for this proposition, but that case in no way supports it, and only refers to the well-known rule that where time is not of the essence a party may, if there has been unreasonable delay, give notice of an intention to avoid the contract unless performed within a reasonable time.⁵ The proposition is opposed to authority⁶ and against principle, for a party cannot avoid performance of his contract according to its terms unless he can show a mutual arrangement to that effect⁷ and the proposition conflicts with the cases in which it has been held that in

Waiver as to one act is no waiver as to a whole series of acts.

¹ Contract Act s. 63, 39; Benj., 5th Ed. 563. Waiver has been said to be not far removed from estoppel: *Kashiram v. Pandu*, (1902) 4 Bom. L R. p. 696.

² *Clydebank Engineering Co. v. Don Jose*, (1905) A.C. p. 18, and see § 555.

³ *Chhagan v. Suka*, (1911) 85 B. 511.

⁴ (1900) 2 Ch. 298.

⁵ See § 532.

⁶ *Kashiram v. Pandu*, (1902) 27 B. 1 F.B. (instalment decree—waiver of time as to some instalments); *Easin Khan v. Abdul Wahab*, (1911) 15 C.W.N. p. 14 (instalment decree); *Hunter v. Daniel*, 4 Ha. 420 (instalment contract).

⁷ *Earl of Darnley v. London C. & D. Ry.*, (1867) L.R. 2 H.L. 43, 60.

an instalment contract each instalment is to be treated as a separate contract,¹ and it seems is unsound and at any rate has no application to commercial contracts.

**§ 544.
Election to
repudiate.**

Prompt.

The principle is well established that the promisee must, on discovering the breach of a condition precedent, exercise his election² to avoid or to affirm the contract.³ If he intends to treat the contract at an end he will lose his right to do so if other parties or the promisor himself is prejudiced by any delay,⁴ and it has been said that it is his duty to act promptly⁵ and he must at once insist on his rights⁶ and so exercise his right as not to lead the promisor to believe that he is still bound.³ For if the promisee induces the promisor to a reasonable belief that he is still bound³ or that the strict fulfilment³ of the condition will not be insisted upon⁷ or continues to treat the contract as subsisting³ or allows the promisor to go on and perform subsequent stipulations, he has thereby waived his right⁸ and estopped himself from setting up the unperformed condition as an answer to his contract,⁹ for waiver may be evinced by any conduct inconsistent with the continuance of the right waived.¹⁰

Thus where analyses were to be attached to a sold note and this was not done, but the broker had a copy and no objection was taken until after suit, it was held that the objection had been waived.¹⁰ Similarly an objection to a

¹ See § 536.

² *United Shoe Machinery Co. v. Brunet*, (1909) A.C. p. 389 P.C.; see Contract Act, s. 39.

³ *Workman v. Lloyd*, (1908) 1 K.B. 968; *Bentsen v. Taylor*, (1893) 2 Q. B. 274 C. A.; cf. s. 39 of the Contract Act.

⁴ *Clough v. L. & N. W. Ry.*, (1871) L. R. 7 Ex. 26, approved in *Scarf v. Jardine*, (1882) 7 Ap. Ca. p. 360 H. of L., where the principle was held to apply to

cases of election generally.

⁵ *Wallis v. Pratt*, (1910) 108 L. T. R. 118 C. A.

⁶ *Sooltan Chand v. Schiller*, (1878) 4 C. p. 258.

⁷ *Reuter v. Sala*, (1879) 4 C. P. D. 243, 249, 253.

⁸ *Roberts v. Brett*, (1865) 11 H. L. C. p. 357.

⁹ See *Shyma v. Heras*, 26 C. 160.

¹⁰ *Cooverjee Bhogee v. R. N. Mookerjee*, (1909) 36 C. 617.

policy under a C. I. F. contract was held to be made too late after acceptance of the documents.¹

If the promisee after breach of a condition precedent agrees to proceed with the contract, the condition is waived² and it is the same as if it had never been inserted in the contract at all,³ save that it may give rise to a claim for damages; this is provided for in sections 117 and 118 of the Contract Act as regards sales of goods, but notice of any such claim must be given in the case of goods originally unascertained⁴ and also, if a term as to time is waived and the promisee accepts performance at a later time, he can only claim compensation for any loss occasioned by the non-performance of the term if he gives notice of such claim at the time of such acceptance.⁵ But the principle of the English cases cited⁶ is adopted in section 15 of the Specific Relief Act in cases where a considerable part of the contract is unperformed or a breach which does not admit of pecuniary compensation occurs, and it is provided that the promisee may obtain specific performance of the rest only on relinquishing all claims to further performance of the part unperformed, and all right to compensation. But the Act only refers to cases where specific performance can be obtained, and it seems where a suit for it is filed.

§ 545.
Effect of continuing the contract.

If one party fails to carry out the condition precedent, and the other party elects to take the benefit of the contract, the latter must perform his part of the contract; and though exact and literal performance of the contract be impossible it must be carried out as nearly as possible.⁶

§ 546.
Duty of promisor when promisee elects to go on with the contract.

¹ *Dupont v. British S. African Co.*, (1901) 18 T.L.R. 24. Cf. *Pressed Miners Gas Co. v. Garner*, (1910) 103 L. T. 223 (objection to references after repudiation on other grounds.)

² Section 39.

³ *Alexander v. Gardner*, (1935)

1 Bing. N. C. 671, 2 L.J.C.P. 223; *Wing v. Harvey*, 23 L.J. Ch. 611.

⁴ Section 118.

⁵ Section 55, no such rule as to notice exists in England.

⁶ *Brojo Soonduree Debia v. Collins*, 13 W. R. 359.

§ 546. Whether in such a case a claim for damages is allowable is not clear¹: apparently it is²; and such right is only lost if the party aggrieved seeks his remedy in a suit for specific performance.¹

Waiver by proceeding with the contract before breach.

Where a promisee having the right by his contract to insist on performance of a condition precedent, before proceeding with his part of the contract, chooses to go on with the contract, he waives the condition precedent as such.³ And if, the terms being cash on delivery, the seller chooses to deliver without payment, he does not obtain any right to rescind the contract on failure of the buyer to pay.⁴

Effect of arbitration.

After goods have been submitted to an arbitrator to decide as to whether they are of the contract quality, and he gives an allowance on examination of samples, it is not open to the buyer to sue for damages for breach of a warranty of quality, unless he can show that the samples sent to the arbitrator were fraudulent: otherwise he is estopped by accepting the goods with an allowance from setting up that the bulk did not correspond with the sample submitted.⁵

§ 547.
Waiver by implication of law.

Waiver of a condition precedent will be implied by law in the following cases:—

(1) Where the promisee prevents or hinders performance. See § 548.

(2) Where the promisor incapacitates himself from performing it. See § 549.

(3) By either party repudiating the contract.⁶ See § 550.

¹ Specific Relief Act, s. 15.

² Contract Act, ss. 117, 118; *Bentsen v. Taylor*, (1898) 2 Q. B. 274 C.A.

³ See § 564

⁴ *Sooltan Chand v. Schiller*, (1878) 4 C. 252.

⁵ *Fornaro v. Ramnarain Sook-*

deb, (1875) 23 W. R. 136 14 B. L. R. 180.

⁶ Repudiation is not a technical term; any failure to perform an essential term whether, intentional or through misfortune, has been called repudiation: *Measures Bros. v. Measures*, (1910). 3 Ch. 248.

(4) By the promisee accepting the benefit of partial performance. *See* § 557. § 547.

(5) By acceptance of the goods when the condition relates to their quality or condition. *See* § 556. Conditions.

(6) By accepting part of the goods. *See* § 560.

(7) By a buyer incapacitating himself from returning the goods.¹ But not in India by the mere passing of the property in goods. *See* §§ 558, 559.

The effect of the insolvency of the buyer has already been considered.²

In the case of reciprocal promises the Code provides that if one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented and he is entitled to compensation,³ and in all cases where the promisee prevents⁴ performance of a condition the law implies a waiver thereof. For if a party to a contract renders its further performance impossible this is a waiver of performance by the other and entitles him to sue as if he had performed his part thereof.⁵ It has been held that impossibility must relate to some substantial or essential part of the contract,⁶ but if a party disables himself from strict performance it has been doubted if he can afterwards allege that it was as to a non-essential particular.⁷ It seems, however, that the distinction between a condition and a warranty prevails no matter in what circumstances a warranty is not performed, for a warranty is a stipulation the breach of which was intended to be compensated for by damages, and subsequent circumstances do not affect this.

§ 548.
Waiver by preventing performance.

Impossibility created by one party.

Must relate to essential part.

¹ This is substantially acceptance and is treated thereunder.

² *See* § 240.

³ Section 58.

⁴ As to what amounts to prevention, see *Lodder v. Slowey*, (1904) A. C. 442 P. C.

⁵ *Planché v. Colburn*, (1881) 8

Bing. 14; *O'Neil v. Armstrong*, (1895) 2 Q. B. 418.

⁶ *Panama Tele. Co. v. India-rubber Co.*, (1875) L. R. 10 Ch. p. 532

⁷ *Fry. on S. P.*, 4th Ed. 461, 5th Ed. 523.

§ 548. The principle also applies where the party entitled to exact performance either hinders or impedes the other party in fulfilling the condition.¹ By section 67 of the Contract Act it is provided that unless reasonable facilities for performance are afforded to the promisor by the promisee, the promisor is excused by such neglect or refusal as to any non-performance caused thereby.

Reasonable facilities.

Lord Blackburn in delivering the judgment of the House of Lords in *Mackay v. Dick*² said, "I think I may safely say that as a general rule where in a written contract it appears that both parties have agreed that something shall be done which cannot effectively be done unless both parties concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of the thing though there be no express words to that effect." In the case for decision the defendant had refused to allow the plaintiff to attempt the test at the place agreed upon on the failure or success of which a machine was to be accepted or rejected, on the ground that it had been proved a failure by other tests : and this was held to be a waiver of the condition that it should pass the test.

Not confined to forcible prevention.

The principle is not confined to cases of direct and forcible prevention, but extends to default or neglect in doing or providing anything which a party ought to do or provide and without which the other party cannot perform the condition,³ as where a contract cannot be completed in the time agreed upon owing to the action of the other party.⁴

¹ *Narain v. Mohendra*, (1911) 15 C. L. J. 332. Benj., 5th Ed., 563.

² (1881) 6 A. C. 251 H.L. (Sc.), (a machine to be accepted if on trial at a particular place it did a certain amount of work), approved in *Sprague v. Booth*, (1909) A. C. 576 P. C.

³ Contract Act s. 67 ; *Giles v. Edwards*, (1797) 7 T. R. 181, 4 R. R. 414.

⁴ *Roberts v. Bury Commissioners*, (1869) L. R. 5 C. P. 310 ; *Holme v. Guppy*, (1838) 3 M. & W. 387, 49 R. R. 647.

It has been held that a party was excused performance by the other party so acting as to expose him to a civil suit by a third party if he carried out the contract.¹

§ 548.
Exposure to
civil suit.

A mere declaration of insolvency does not entitle the other party to repudiate the contract unless the circumstances show that the insolvent cannot or does not intend to carry out the contract.²

Insolvency.

Where performance of a condition precedent is rendered impossible by the neglect or default of the other party "it is equal to performance,"³ and if the prevention goes only to one particular term or condition of the contract, the party prevented is entitled to insist on payment or other reciprocal performance, and has a claim for compensation for any loss.⁴

Effect of
prevention.

The promisor must prove that he was prevented or hindered by the act of the promisee or his agents.⁵ But if a third party prevents performance, the case may come within section 56 of the Contract Act.⁶ As Chitty⁷ puts it, the promisee must be the *causa causans* and not the *causa sine qua non*.⁸

Promisee
must be to
blame.

¹ *European Royal Mail v. Royal Mail*, (1881) 80 L. J. C. P. 247.

(1862) 13 C. B. N. S. 149; 82 L. C. P. 68; *Roberts v. Bury*, (1869) L. R. 5 C. P. 310, 329.

² *Mess v. Duffus*, (1901) 6 Com. Cas. 165; see §§ 240, 647.

⁴ See Contract Act ss. 3, 53, 67.

³ *Hotham v. East India Co.*, (1787) 1 T. R. 645; *Clarke v. Westrope*, (1856) 25 L. J. C. P. 287; see too *Pontifex v. Wilkinson*, (1845) 1 C. B. 57; *Holme v. Guppy*, (1838) 3 M. & W. 387; 49 R. R. 647; *Laird v. Pim*, (1841) 7 M. & W. 474; *Cort v. Ambergate Ry. Co.* (1851) 17 Q. B. 127; 20 L. J. Q. B. 460; *Thornhill v. Neals*, (1860) 8 C. B. N. S. 831; *Russell v. Bandeira*,

⁵ *Budgett v. Binnington*, (1891) 1 Q. B. 85; *O'Neil v. Armstrong*, (1895) 2 Q. B. 70, 418.

⁶ *Volkart v. Nusservanji Jehangir*, (1889) 13 B. 392.

⁷ 15 h Ed. 717.

⁸ *Alston v. Herring*, (1856) 11 Ex. Ch. 822; *Lodder v. Slowey*, (1904) A. C. 442 P. C.

Where promisee refuses to accept performance.

If the promisee refuses to accept the stipulated benefit which the promisor is ready and willing to give, he may be charged with his promise as absolute.¹

§ 549.
Waiver by incapacitating himself from performance.

A condition precedent may be waived by the promisor incapacitating himself from performing it.² If a person sells specific goods to be delivered on the request of the buyer, and afterwards sells and delivers the same goods to another, he dispenses with the request of the former buyer for delivery as a condition precedent to delivery.³ So if a party by his conduct make it impossible for himself to complete his contract, that is repudiation of the contract and a waiver of conditions precedent.⁴

Inability prior to time for performance.

But mere inability to perform a condition at some date prior to the day fixed for performance is no ground for repudiation unless it is so by agreement or custom. But the promisee is not always bound to wait until the due date. He need not do so if he can show by sufficient evidence that the condition cannot be practically fulfilled by the due date, nor when the promisor has substantially admitted that the condition is incapable of fulfilment.⁵

Notice of inability.

But it has been said that the fact that one party knows that the other cannot fulfil his part of a contract is not, in the absence of any notice express or by conduct from the other party to that effect or any such act as re-selling goods which ought to be delivered under the contract, a waiver of any concurrent

¹ *Bradley v. Benjamin*, 46 L. J. Q. B. 590; *Stewart v. Rogerson*, (1871) L.R. 6 C.P. 424 (refusal to name place for delivery, liable for full freight); *Giles v. Giles*, (1849) 9 Q.B. 164.

² See Contract Act ss. 34, 39; *Subba Rau v. Devur Shetti*, (1894) 18 M. 126.

³ *Bowdell v. Parsons*, (1808) 10

East. 359; *Hotham v. East India Co.*, 1 T.R. 638; see *Forrest v. Aramayo*, (1900) 83 L. T. 385 C. A.

⁴ *Ford v. Tiley*, (1827) 6 B. & C. 325, 30 R. R. 389; *Lovelock v. Franklyn*, (1846) 8 Q. B. 371, 70 R. R. 520.

⁵ *Smith v. Butler*, (1900) 1 Q. B. 694, 699 C. A.

condition.¹ But in India section 39 does not require any notice ; the fact of disabling himself is a waiver of any interdependent condition incumbent on the other party. § 549.

In certain cases a contractor, although by extinguishing a specific thing he renders himself unable to perform the contract, is not liable as for a breach of contract. For such extinguishment may be allowed by the contract as where he exercises a power, given expressly or by implication by the contract, of controlling the happening of an event upon which performance was to depend.² No such power will be implied if the effect would be to cause a failure of consideration to the other party.³ The subject is further discussed under implied terms. But contract may give an option.

And if a man promises to marry one person on the fulfilment of certain conditions as to time, request or otherwise, and then marries another, he waives anything that might have been a condition precedent to his liability on his promise.⁴

If the promisor incapacitates himself before the time for performance, the promisee may treat it as an immediate breach and sue at once,⁵ and this is so even if Incapacitating himself prior to due date.

¹ *Forrest v. Aramayo*, (1900) 88 L.T. 335 C. A., where neither party was ready to perform concurrent promises, and it was held that in a suit for the price of goods delivered late but accepted, the buyer could not counterclaim for penalties for late delivery unless he could show that he was ready to perform his part at the due date. The P.C. in *Wertheim v. Chicoutimi*, (1911) A. C. p. 313, held that where the sellers had stated that they could not supply a cargo, it was absurd to send a ship for a cargo which it was known beforehand could not or would not be supplied, or to make a formal demand for goods as that had been made in effect many times to no purpose. This leaves the point in some doubt in England, for, although there was notice of inability given by the

sellers, still the P.C. seem to rely on the fact that the buyers knew that performance of the condition incumbent on them was useless, and not to have insisted in any particular source of knowledge, nor was any reference made to the ability of the buyers to send a ship.

² *Biswick v. Swindells*, (1835) 3 A. & E. 868.

³ *Stirling v. Maitland*, (1864) 5 B. & S. p. 852; see *McIntire v. Belcher*, (1863) 14 C.B.N.S. 654 ; *Ogdens v. Nelson*, (1904) 2 K. B. 410 C.A.

⁴ *Short v. Stone*, (1846) 8 Q. B. 358, 15 L. J. Q. B. 143 ; *Caines v. Smith*, (1846) 15 M. & W. 189, 15 L. J. Ex. 106, and see Contract Act ss. 39, 51.

⁵ *Synge v. Synge*, (1894) 1 Q.B. 466 C.A.

the promisor might be or is in a position to fulfil the condition on the day fixed.¹

§ 550.
By repudiating the contract.

An absolute refusal to perform an agreement or an absolute repudiation of the contract² communicated³ to the other party and treated and acted upon as such by him⁴ is a waiver and excuse of performance by him of future conditions precedent.⁵ There is no need in such a case to actually tender the goods.⁶ But a breach occasioned by a party's own wrongful refusal to accept performance is not a repudiation of the contract.⁷

Must be treated as such.

To operate as a waiver a repudiation must be accepted and acted on as such, for of itself it is a mere nullity.⁸

¹ Contract Act s. 34; *Short v. Stone*, (1846) 8 Q.B. 358; *Bowdell v. Parsons*, (1808) 10 East. 359; *Planché v. Colburn*, (1831) 8 Bing. 14. But see *Forrest v. Aramayo*, (1900) 83 L.T. 335.

² See, for the rule where the refusal only relates to part of the contract, § 554, and as to Instalments Contracts, § 537-539.

³ See § 549 and 554.

⁴ *Gueret v. Audony*, (1893) 62 L.J. Q. B. 633; Contract Act s. 39.

⁵ *Ripley v. McClure*, (1849) 4 Ex. 345; *Cort v. Ambergate Ry.*, (1851) 17 Q.B. 127; *Bank of China v. American Trading Co.*, (1894) A. C. 266; *Re Coleman's Depositories*, (1907) 2 K. B. pp. 805, 806.

⁶ *Cort v. Ambergate Ry.*, supra; see *Beys Craig & Co. v. Otto Martin*, (1892) 16 B. 389 O.C. (no need to give subsequent notices); cf. *Borrowman v. Free*, (1879) 48 L. J. Q. B. 65, refusal to accept a cargo is waiver of tender of shipping documents; see *Reuter v. Sala*, (1879) 4 C. P. D. 239, per Brett, L.J., as to refusal of a tender of the whole being waiver of tender of a part; *Wertheim v. Chicoutimi*, (1910) 16 Com. Cas. 297 P.C. (1911) A.C. 301 (no need to make a formal demand for or

send ship for goods which the sellers said they would not or could not supply).

⁷ *Fitt v. Cassanet*, (1842) 4 M. & Gr. 898.

⁸ Benj. 5th Ed. 565; *Mansuk Dass v. Rangayya*, (1863) 7 M. H.C. 162; 1 M. 162; *Michael v. Hart*, (1902) I.K.B. 482; as to what amounts to repudiation, see *Gueret v. Audony*, (1893) 62 L. J. Q. B. 633 C. A.; *General Bill-slicking Co. v. Atkinson*, (1909) A. C. 118 H. of L. Absolute refusal: *Ripley v. McClure*, (1849) 4 Ex. 345; *Hochster v. De La Tour*, (1853) 2 E. & B. 678; *Danube Co. v. Xenos*, (1862) 13 C. B. N. S. 825; *Leeson v. N. British Oil Co.*, (1874) Ir. Rep. 8 C.L. 309; see *Freeth v. Burr*, L. R. 9 C.P. 208; *Rash Behary Shaha v. Nritva Gopal Nundy*, 33 C. 477. Not acted on: *Avery v. Bowden*, (1856) 6 E. & B. 958; *Reid v. Hoskins*, (1855) 5 E. & B. 729; *Johnstone v. Milling*, (1886) 16 Q. B. D. 460 C. A. Not accepted: *Boorman v. Nash*, (1829) 9 B. & C. 145; *Brown v. Muller*, (1872) L.R. 7 Ex. 319; *Phillipotts v. Evans*, (1839) 5 M. & W. 475; *Boswell v. Kilborn*, (1862) 15 Moo. P.C. 309.

The earlier cases merely decided that a refusal to perform the contract before the date of performance was not of itself necessarily a breach of it,¹ but if such refusal was unretracted down to and inclusive of the time when performance was due, it was evidence of a continuing refusal and of a waiver of any condition precedent incumbent on the other party.² *Frost v. Knight*³ established that the promisee could on such refusal before the due date at once bring an action if he accepted it.⁴ The reason for this is that before the date for performance a party has an inchoate right to performance, and in the meantime he has a right to have the contract kept open as a subsisting and effective contract.⁵

§ 551.
Position on
repudiation.

Action before
due date.

Under section 66, the other party may notify that he accepts the repudiation; and if he does, the defaulting party is bound by it.⁶ But until he accepts it the contract is still subsisting,⁷ and the promisor may retract his repudiation,⁸ and may avail himself of any intervening circumstance as a justification of his action,⁹ or as a defence either wholly or in part against the promisee's claim.

Notice of acceptance of
repudiation.

Whether the buyer accepts the repudiation or not the damages are calculated as at the due date,¹⁰ and if he accepts he must mitigate them.¹¹

Damages.

¹ *Mackertick v. Nobo Coomar*, (1903) 30 C. 477.

² *Cort v. Ambergate Ry.*, (1851) 20 L. J. Q. B. 460.

³ (1870) L. R. 5 Ex. 322, 7 Ex. 111; see *Michael v. Hart*, (1902) 1 K. B. 482 C.A.; cf. *Purshotamdas v. Purshotamdas*, (1897) 21 B. 23, 35.

⁴ *Mansuk Das v. Rangayya*, (1863) 1 M. H. C. 162; until he accepts he has no cause of action.

⁵ *Frost v. Knight*, *supra*.

⁶ Contract Act, s. 66.

⁷ *Mackertick v. Nobo Coomar*, (1903) 30 C. 477.

⁸ Contract Act, s. 6 and s. 66; *Cort v. Ambergate Ry.*, (1851) 17 Q.B. 127.

⁹ *Frost v. Knight*, (1870) L.R. 5 Ex. 322, (1872) L.R. 7 Ex. 111; *Cort v. Ambergate Ry.*, *supra*; *Honck v. Muller*, (1881) 7 Q. B. D. 92; *Braithwaite v. Foreign Hard Wood Co.*, (1905) 2 K. B. 543.

¹⁰ Contract Act, s. 73, illus. (c), (h); *Phillipotts v. Evans*, (1839) 5 M. & W., 475; *Michael v. Hart*, (1902) 1 K. B. 482 C. A.

¹¹ Section 73 Explanation; *Roper v. Johnson*, (1873) L. R. 8 C.P. 167.

§ 552.
Option to
repudiate.

As the promisee has an option to accept the repudiation or not,¹ the general rules as to election apply. He has a right to wait as long as he does not injure the other party,² or third parties,³ for if an innocent party meanwhile acquires an interest in the subject matter of the contract the promisee's option is lost.³ The same result follows if he leads the promisor to believe that he is insisting on the contract being performed.⁴ If he intends to accept the repudiation he must give notice to that effect⁵; until that is done the promisor may revoke his repudiation, and insist on performance of the contract, for there is no necessary inconsistency in so doing even after an unsuccessful attempt to rescind.⁶ After the notice of acceptance of the repudiation is given, the promisor cannot avail himself of any facts even if they existed at the time of the repudiation without his knowledge, as a defence of his act, or as a condition precedent to the promisee's right to claim performance.⁷

Effect of
notice.

When res-
cission is
complete.

There may be some doubt in England as to what accepting and acting upon a repudiation means. But under the Contract Act, section 66 and sections 4, 5, and 6, it is clear

¹ *Michael v. Hart*, (1902) 1 K. B. 482.

² *Scarf v. Jardine*, (1883) 7 A.C. p. 361; approving *Clough v. L. & N. W. Ry.*, (1871) L.R. 7 Ex. 26, 37; see *Rankin v. Potter*, (1873) L.R. 6 H.L., pp. 124, 125.

³ *Oakes v. Turquand*, (1867) L.R. 2 H.L. 325; *Talcb Hossein v. Amcer Buksh*, 22 W.R. 529.

⁴ See § 544.

⁵ Contract Act, s. 66; see per Bramwell, L.J., in *Rankin v. Potter*, (1873) L.R. 6 H.L. p. 136.

⁶ *Srisa Chandra Roy v. Roy Banomali*, (1905) 2 A.L.J. 31 P.C.

⁷ *Braithwaite Foreign Hard*

Wood Co., (1905) 2 K.B. 548, where however the repudiation was a waiver of any tender; certainly he cannot raise any objection which he has waived: see *Prested Miners Gas, etc., Co. v. Garner*, (1910) 108 L.T. 228. But in *Wright's case*, (1871) L.R. 7 Ch. 55, 41 L.J. Ch. 1, an amicable agreement to rescind a sale of shares between the directors and a shareholder. was supported as against the company, on the ground that the shareholder could have repudiated his shares for fraud in the prospectus, had he known the facts.

that a rescission is complete as against the party in default when it is communicated to him.

It has been held that a buyer who has repudiated his contract by refusing to accept goods, may at any time before the verdict offer to take the goods and to pay all costs and charges occasioned by his breach of contract and thereby reduce the damages which Pontifex, J., suggested would then be a farthing.¹ But this view conflicts with the rule that anything occurring after the delivery of the writ is irrelevant,² and could only apply where the goods were still available. It is clear that after refusing one tender, a buyer cannot demand a second,³ and then sue for non-delivery, the first refusal having been accepted by the seller. It seems that once the acceptance of repudiation is communicated to the other party, no tender of performance avails but it might go to reduce damages, under section 73, if the other party by accepting it could have mitigated his loss.

§ 552.
Where after rescission the promisor offers performance.

The position of the promisee, where there has been a repudiation of the contract accepted and acted on, must next be considered. It is quite clear that in such a case there is no need to make an actual tender of the goods⁴ or price⁵ or to otherwise comply with the terms of the contract.⁶

§ 553.
Must the promisee after repudiation show readiness and willingness.

But it was never questioned in the earlier cases that the promisee must in such a case aver that he was ready and willing to perform his promise.

Averment of readiness and willingness.

¹ *Buchanan v. Avdall*, (1875) 15 B.L.R. pp. 292, 293.

Silkstone Coal Co. v. Joint Stock Coal Co., (1877) 85 L.T. 668.

² *Clayton v. Le Roy*, (1911) 2 K.B. 1031 C.A.

⁵ *Shriram v. Madangopal*, (1908) 30 C. 865 P.C. (no need to tender price).

³ *Hellgers v. Jadul Lall*, (1889) 16 C. 417.

⁶ *Beyts Craig v. Otto Martin*, (1892) 16 B. 889 (no need to give subsequent notices).

⁴ *Cort v. Ambergate Ry.*, (1851) 17 Q. B. D. 127 (no need to manufacture goods ordered);

§ 553.

Averment of
readiness and
willingness.

In all the earlier English cases the promisee gave evidence of readiness and willingness, although there had been a repudiation of the contract.¹

In India it was held that a repudiation exonerated the seller from giving proof of readiness and willingness.² But the Privy Council in a recent case³ held that under section 51 the words "no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise" do not require a promisee to do more than 'be ready and willing to carry out the contract': and as the buyer in that case had given evidence of readiness and willingness by proof of preparations for payment he could sue for non-delivery without proving an actual tender of the price. And Sir Barnes Peacocks ruled that unless the plaintiff in a suit for non-acceptance can show that he was ready and willing to deliver the identical goods ordered, he cannot succeed although the buyer has not made any demand for delivery.⁴

Where
condition
precedent.

The rule is thus expressed in Chitty,⁵ in the case of a condition precedent, that is, where an act is to be performed by the plaintiff before the accruing of the defendant's liability, the plaintiff must state and prove either performance or an offer to perform which the defendant rejected, or his readiness and willingness to fulfil the condition until the defendant discharged him from performance or prevented the performance of the condition.

Where
conditions
concurrent.

In the case of concurrent conditions, that is, where the acts to be done by each party are to occur at the same period, neither party can sue without showing that he was

¹ *Cort v. Ambergate Ry.*, (1851) 20 L.J. Q.B. 460.

² *Dayabhai v. Maniklal*, (1871) 8 B.H. C.A.C. 123; *Dayabhai v. Dullabhram*, (1871) 8 B.H.C. A.C. 138.

³ *Shriram v. Madangopal*, (1903) 30 C. 865 P.C.

⁴ *Robertson Gladstone v. Kas-tury Mull*, (1869) 3 B.L.R. O. C. 103; *Bihanlal v. Madhusadan*, (1869) 2 B.L.R. O.C. 154.

⁵ 15th Ed. (1910) p. 715.

ready and willing to perform his part,¹ or a discharge or prevention of such performance by the other party²; and where there has been such a discharge the plaintiff must show notice to the other side of his readiness and willingness to perform,³ though there may be an agreement to the contrary.⁴

§ 553.
Ready and willing notice.

Of course, the seller must be ready and willing to deliver goods of the contract quality,⁵ unless there has been a waiver of that condition precedent.

Correct quality and quantity.

In a recent appeal⁶ case in England, however, where on a tender of bills of lading the contract was repudiated, it was held in a suit for non-acceptance that the buyer could not set up that the sellers were not ready and willing to perform conditions precedent; and that although the condition precedent was to tender goods of the contract quality, the sellers were not in law entitled even to an allowance for admitted inferiority, which the lower Court had given them, although the suit was for the difference between the price obtained on re-sale of these

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¹ *Forrest v. Aramayo*, (1900) 88 L. T. 335 C.A. But if the buyer accepts goods delivered late, he must pay for them.

Dyall, (1888) 9 C. 791.

⁴ *Parker v. Rawlings*, (1827) 4 Bing. 280.

² *Rawson v. Johnson*, (1801) 1 East. 203 (no tender of price necessary); *Jackson v. Allaway*, (1844) 6 M. & G. 942 (no tender of delivery necessary); *Boyd v. Lett*, (1845) 1 C. B. 222, S. of G. Act, 628, Contract Act; *Atkinson v. Smith*, (1845) 14 M. & W. 695; *Bankart v. Bowers*, (1865) L. R. 1 C. P. 484; *Minshull v. Brinsmead*, (1888) Cal. & Ell. 97.

⁵ *Bihantal v. Madhusudan*, (1869) 2 B. L. R. O. C. 154 (*ex a ship*); *Robertson Gladstone v. Kustury Mull*, (1869) 3 B. L. R. O. C. 103 (*ex a ship*).

³ *Doogood v. Rose*, (1850) 9 C.B. 132; *cf. Commercial Bk. v. Modoodan*, 1 Ind. Jur. N. S. 17; *Jevraj Megji v. Poulton*, 2 B. 267; as to what amounts to giving notice, see *Juggunauth Shaw Bose v. Ram*

⁶ *Braithwaite v. Foreign Hard Wood Co.*, (1905) 2 K.B. 513 C. A., cited by Addison 11th Ed. 603, as deciding that after repudiation before delivery the buyer cannot, if the seller accepts the repudiation, set up the defence that an instalment was not in accordance with the contract, which is doubtless so, as an answer to the suit, but semble he can as a counter-claim.

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inferior goods and the contract rate, which was of course for the superior quality.

The buyers repudiated the contract because they said that the sellers were selling similar goods elsewhere in violation of the contract, and adhered to their repudiation when bills of lading were tendered. The Court said "that act involved a refusal of the particular consignment and amounted to a waiver" of conditions precedent. The same principle of making no allowance for admitted inferiority was applied in India where the buyers, after acceptance, rejected the goods and the sellers resold against them, and Sale, J., without giving any reason allowed as damages the full difference between the resale price and the contract price.¹ These rulings in effect mean that repudiation is waiver of the necessity to prove readiness and willingness to perform the contract by the other party. Whether this is sound is open to doubt in India.

It conflicts with the general rule that in an action for non-acceptance it is sufficient but also necessary for the seller to show that he was ready and willing to deliver the correct goods,² for a reasonable time.³

Averment of
 readiness and
 willingness
 necessary.

The rule that even after repudiation an averment is necessary that the plaintiff was ready and willing until he was discharged by the repudiation, and that but for the repudiation he would and could have made a proper tender, seems more consonant with justice; for the goods tendered, or which the seller would have tendered, might not be either of the quality or the quantity contracted for. And to rule that a repudiation of a contract involves the risk of paying as damages the difference between the price obtained on the resale of 90 tons of fourth-rate coal and the contract price for 100 tons of

¹ *Haridas Khandilwah v. 11 M. & W.*, p. 856.
Kalumall, (1908) 80 C. 649 O. C. ² *Granger v. Dacre*, (1844).
³ *Hannuic v. Goldner*, (1848) 12 M. & W. 431.

first-class coal seems to conflict with the rules¹ as to damages being given for the actual loss only.² Further in the case cited a breach of contract occurred when the sellers shipped inferior goods and waiver in this connection is only of future performance,³ the principle being *lex neminem ad vana coget*.⁴ The measure of damages in *Cort v. Ambergate Ry.* was profit which the supplier would have made had he been allowed to complete his contract : and clearly any facts were relevant to show what that would have been. Moreover, the seller's election being defective was ineffective to appropriate any goods to the contract (unless it was protected by a clause for allowance for inferiority in which case where was the waiver of that clause ?); therefore no property having passed a resale had no effect and the Court should have assessed the damages as the difference between the contract and market rate of goods as bargained for.

§ 553.

Averment of readiness and willingness necessary.

It is submitted, therefore, that whether the condition is precedent or concurrent,⁵ a plea of readiness and willingness, until the repudiation was accepted, is essential.⁶ And that although the fact that the party fails to prove such an averment is no defence to an action for repudiation, there being a waiver of actual tender, still such failure affects the damages.³

In common sense the meaning of an averment of readiness and willingness must be that the non-completion of the contract was not the fault of the plaintiffs and

Meaning of 'ready' and 'willing.'

¹ Section 78.

² See *Erie County Co. v. Carroll*, (1911) A. C. 105 P. C.; *Wertheim v. Chicoutimi*, (1911) 80 L. J. P. C. 91, where resales by the buyer were taken into account to reduce the loss.

³ See per *Halsbury L. C.* in *Clydebank Engineering Co. v. Don Jose*, (1905) A. C. p. 14.

⁴ *Benj.* 5th Ed. 564.

⁵ See *Forrest v. Aramayo*, (1900) 88 L.T. 835 C. A., for effect of mutual failure to perform ; and § 570.

⁶ *Measures Bros. v. Measures*, (1910) 2 Ch. 423 (no suit in independent covenant without the plaintiff showing readiness and willingness on his part).

§ 553. that they were disposed and able to complete it if it had not been renounced by the defendants,¹ for readiness and willingness to perform an act implies the ability to do it,² and must exist for a reasonable time.³

Proof of
readiness
and willing-
ness. ,

It is said ⁴ that in an action for non-delivery the averment of the plaintiff's readiness and willingness to perform his part of the contract is proved by showing that he called on the defendant to accomplish his part. But the cases cited do not support this statement, but merely show that where delivery and payment were concurrent conditions, and no delivery was given on demand, the buyer need not prove tender of the price, but an averment that he was ready and willing to pay is sufficient and this is shown *primâ facie* by his demand.⁵ So where the seller was to deliver into the buyer's carts, and gave the buyer notice that he was ready, it was held that a plea of readiness and willingness and notice thereof to the buyer was sufficient without any proof of tender, but it would have been otherwise if the seller had to deliver to the buyer or by the buyer's carts.⁶ So where the buyer was insolvent and the seller asked him to take delivery it was held that in a suit for non-delivery he need not prove a tender of delivery ; proof of readiness and willingness was enough, but the buyer had repudiated the contract and was insolvent.⁷ It is sufficient

Notice.

¹ *Per* Lord Campbell in *Cort v. Ambergate Ry.*, (1851) 17 Q. B. 127, 20 L. J. Q. B. 460.

² Bullen and Leake Ed. 1905, 766; *De Medina v. Norman*, (1842) 9 M. & W. 820 ; *Lawrence v. Knowles*, (1839) 5 Bing. N.C. 399; *Elles v. Rogers*, 29 Ch. D. p. 667.

³ *Granger v. Dacre*, (1844) 12 M. & W. 481.

⁴ 2 Sm. L. C. 9th Ed. p. 18; Chalmers 7th Ed. 81.

⁵ *Wilks v. Atkinson*, (1815), 1 Marsh 412; *Levy v. Herber*, 7

Taunt. 314; *Pickford v. Grand Junction Ry. Co.*, 8 M. & W. 372. But *quaere*, for unless it is shown that he was himself ready and willing to perform his part, he cannot sue for a breach of contract, the conditions being concurrent; *Forrest v. Aramayo*, (1900) 83 L.T. 385 C.A.

⁶ *Jackson v. Allaway*, (1844) 6 M. & G. 942.

⁷ *Baker v. Firminger*, (1859) 28 L.J. Ex. 180.

if the seller can show that he could deliver under a collateral contract to supply him though he is unable to pay his seller who is however willing to deliver to the sub-buyer.¹ Mere delay in paying does not amount to not being ready and willing to do so;² and in the case of a sale of shares, in order to prove readiness and willingness, it is not necessary that the seller should be the beneficial owner of the shares, or that he should tender the final documents of title. It is enough if he should be able and willing to constitute the buyer the legal owner of the shares agreed to be sold³ when called upon to deliver, although he may not have been able to do so at some anterior time.⁴

§ 553.

Delay in payment.

Ready at due date.

Repudiation may be express or it may be inferred from the facts of the case.⁵ Repudiation by one of several joint promisors is sufficient to justify avoidance of a contract for the promisee may call on any of them to perform.⁶

§ 554.

What amounts to repudiation.

Express or implied.

By one of several joint promisors. Express.

Notice of.

Notice of repudiation in order to entitle the other party to avoid the contract must express an absolute and unequivocal intention of renouncing and repudiating the contract.⁷ A mere assertion that a party will be unable or will refuse to perform his contract is not sufficient,⁸ nor is a threat that he will not do so⁹ if it relates to a non-essential term of the contract.

¹ *Cohen, v. Cassim*, 1.C. 264.

² *Woolfe v. Horne*, (1877) 46 L. J. Q. B. 534, 2 Q. B. D. 355.

³ *Imperial Banking Co. v. Atmaram*, (1865) 2 B. 260, 2 B.H.C. 246; *Parbhudas v. Ramlal*, (1866) 8 B.H.C. 69; see *Jivaraj v. Poulton*, (1865) 2 B. 267, 2 B.H.C. 253.

⁴ *Jivaraj v. Poulton*, (1865) 2 B.H.C. 253; see *Smith v. Butler*, (1900) 1 Q. B. 694, for the rule and its limitations.

⁵ There is a distinction between ordinary contracts and contracts for delivery by instal-

ments; see § 538.

⁶ *R. Y. R. M. C. Chettiar v. S. S. Pather*, 19 M. L. J. 28.

⁷ *Mersey Steel Co. v. Naylor*, (1884) 9 Ap. Ca. 434; *Cornwall v. Henson*, (1900) 2 Ch. 298, 69 L. J. Ch. 581.

⁸ *Johnstone v. Milling*, (1886) 16 Q. B. D. 460, 55 L. J. Q. B. 162; a request for time to pay or notice of inability to pay is not enough; *Rash Behary Shaha v. Nritiya*, (1906) 83 C. 477.

⁹ *Dickenson v. Fanshaw*, (1892) 8 T. L. R. 271.

§ 554.
Inferred.

But there is no need that a party should expressly state his intention, and if in fact he is repudiating the contract, his mere assertion that he intends to carry it out is of no avail to destroy the promisee's right to avoid the contract.¹

Test.

The test to be applied is : does the conduct of the party evince an intention no longer to be bound by the contract.²

**Meaning of
Intention.**

The idea of repudiation in section 31 of the Sale of Goods Act, does no doubt involve in a sense an intention to repudiate, but to constitute repudiation as Sir George Jessel pointed out in the *Mersey Steel Co. v. Naylor*,³ it is not necessary that the party should say "I will repudiate the contract or I intend to do so." If in fact he is repudiating the contract he is doing so although he may be contending that he is performing the contract, and may be intending and expressing an intention to perform what is left of the contract.⁴

**Need not be
wilful.**

Repudiation need not be wilful in the sense of being intentional. It is sufficient if there is default, and inability to perform through misfortune is no defence unless the contract so provides.⁵

**Inferred
from acts.**

Where the question is whether the acts and conduct of the one party do or do not amount to an intimation of an intention to abandon and altogether to refuse performance of the contract, the Court must look to the actual circumstances to see if the one party is relieved from future performance by the conduct of the other.⁶

¹ *Millars v. Weddell*, (1909) 14 Com. Cas. 25.

Com. Cas. 25.

² *Boston Deep Sea Fishing Co. v. Ansell*, (1889) 39 Ch. D. 339, 365; *General Bill-posting Co. v. Atkinson*, (1909) A. C. 118. H. L.

⁵ *Measures v. Measures*, (1910) 3 Ch. 248.

³ (1882) 9 Q. B. D. 648, 51 L.J. Q. B. 576.

⁶ *Rash Behary Shaha v. Nrittya Gopal Nundy*, (1906) A. C. 33 C. 477, citing *Mersey Steel Co. v. Naylor*, (1884) 9 A. C. 434; *Sooltan Chand v. Schiller*, (1878) 4 C.

⁴ *Millars v. Weddell*, (1909) 14

252.

If there is a distinct refusal¹ by one party to be bound by the terms of the contract in the future, the other party may treat it as at an end.² But it must be a final refusal.³ So if the refusal relates to the performance of a condition precedent, it clearly entitles the promisee to avoid the contract.⁴ If it does not, it was held that a refusal to perform it, may carry with it an implication of an intention to repudiate the whole contract⁵; but further the parties have proceeded with the performance, the less likely the inference⁵: but the same Court subsequently held that to draw such an inference from conduct, the failure must go to the root of the contract.² In the most recent case the view taken was that a failure to perform one term which in itself would not justify avoidance might do so if supplemented by an inference that the remaining terms of an instalment contract would be similarly unperformed.⁶ For the circumstances under which a failure in relation to one instalment occurs, may raise the inference of an intention to make a like failure in other instalments and so give a right to avoid the contract.⁶

§ 554.
Where the refusal relates to a condition precedent. Where it does not.

The cases cited for the above propositions all relate to instalment contracts, where the rules as to presuming what terms are conditions are not so strict as in ordinary contracts, but the same principles apply more strictly in determining what is repudiation in ordinary contracts.⁷ The House of Lords has recently said that in the case of

¹ *Withers v. Reynolds*, (1831) 1 L. J. K. B. 30; *Hockster v. DeLa Tour*, (1853) 22 L. J. Q. B. 455; *Mersey Co. v. Naylor*, 53 L.J.Q.B. p. 501, 9 A.C. p. 442.

² *Rhymney Ry. Co. v. Brecon*, (1900) 69 L. J. Ch. 813, C. A.; see *Johnstone v. Milling*, (1886) 16 Q. B.D. 460, 55 L.J.Q.B. 167; *Roper v. Johnson*, (1873) L.R. 8 C.P. 167.

³ *Smith v. Butler*, (1900) 1 Q. B. 694.

⁴ *Mersey Steel Co. v. Naylor* (1884) 9 A. C. p. 439.

⁵ *Cornwall v. Henson*, (1900) 2 Ch. 298, 303 C. A.

⁶ *Millars v. Weddell*, (1909) 14 Com. Cas. 25 Div. Ct.

⁷ See § § 533, 538.

§ 554. an ordinary contract, that the true test is : do the acts and conduct of the party evince an intention no longer to be bound by the contract.¹ It has been held that the fact that one party knows that the other cannot perform his part of the contract is not, in the absence of notice to that effect from him or of any act such as reselling the goods to be delivered, a waiver of conditions incumbent on the other party.² This is opposed to the *ratio decidendi* of a Privy Council case where however the sellers had said they could not supply goods, and the buyers were held absolved from tendering a ship for the goods or from making a formal demand for delivery which they knew to be useless.³ It also conflicts with the above cited rulings that notice or a refusal are not necessary where the conduct of a party shows an intention not to fulfil his contract, for it makes no difference, if the failure occurs, what the actual intention was.⁴ And section 39 of the Contract Act does not draw any such distinction between the effect of a party disabling himself by reselling the goods sold or by any other conduct.

Playing fast and loose. If a party is playing fast and loose, the other party may treat the contract as rescinded.⁵

Section 39. Section 39,⁶ in referring to a refusal to perform the contract, it seems, must mean the contract as intended by the parties, and a refusal or failure to perform terms for the breach of which the parties considered damages a sufficient compensation, *i.e.*, warranties in the English sense, will not give a right of avoidance, except in the

¹ *General Bill-posting Co. v. Atkinson*, (1909) A. C. 118.

² *Forrest v. Aramayo*, (1900) 83 L.T. 385 C. A.

³ *Wertheim v. Chicoutimi*, (1911) A.C. 301 ; see too *Smith v. Butler*, (1900) 1 Q. B. 694, per Romer L.J. and at p. 700.

⁴ *Measures Bros. v. Measures*, (1910) 2 Ch. 243.

⁵ *Smith v. Wallace*, (1895) 1 Ch. p. 390 (a case relating to land).

⁶ A section of doubtful import : *Sooltan Chand v. Schiller*, (1878) 4 C. p. 258; but see s. 55.

case of cumulative breaches of such terms in instalment contracts.¹ § 554.

The principle applies where the buyer after accepting part of the goods, refuses to accept any more. Such refusal may be inferred from his conduct, as where the buyer in an instalment contract, payment to be made on each delivery, declined to pay on delivery.² And if the acts and conduct of the party evince an intention no longer to be bound by the contract, the other party in spite of substantial part performance, is justified in avoiding the contract.³ Where part accepted.
Part performance.

A party has no right before performance is due to demand and have a distinct notice whether the other party intends to perform the contract or not⁴ or whether the other party intends to exercise an option to cancel before the proper time for so doing.⁵ No right to notice before due date.

Non-payment of money which there is an obligation to pay, does not go as a rule to the root of the contract,⁶ in instalment contracts, but it does *prima facie* in entire contracts,⁷ even though the seller had an option to deliver by instalments if he has elected to make one delivery.⁸ What is not sufficient failure.

A mistaken construction of the contract⁹ or an imperfect tender which may be amended in time,¹⁰ has been held insufficient.

¹ *Millars v. Weddell*, (1909) 14 Com. Cas. 25 Div. Ct.

² *Withers v. Reynolds*, (1831) 2 B. & Ad. 882; *Mersey Steel Co. v. Naylor*, (1884) 9 App. Ca. p. 442; *Planché v. Colburn*, (1881) 8 Bing. 14; *Hoare v. Rennie*, (1859) 29 L. J. Ex. 72; *Hockster v. De La Tour*, (1855) 2 E. & B. 678.

³ *General Bill-posting Co. v. Atkinson*, (1909) A.C. 118 H. of L.

⁴ *Ripley v. McClure*, (1849) 4 Ex. 345, 18 L. J. Ex. 419.

⁵ *Moel Tryvan Ship Co. v. Andrew Weir*, (1910) 2 K.B. 844 (option to cancel charter if boat

arrived late; no need to exercise until arrival).

⁶ *Rash Behary Shaha v. Nrittya Gopal Nundy*, (1906) 83 C. 477 A. C.; see Contract Act section 121; *Buldeo Das v. Howe* (1884), 4 C. 64; *Mersey Steel Co. v. Naylor*, (1884) 9 App. Ca. 434.

⁷ *Bowes v. Shand*, (1877) 2 App. Ca. 455.

⁸ *Reuter v. Sala*, (1879) 48 L. J. C. P. 492.

⁹ *Mersey Steel Co. v. Naylor*.

¹⁰ *Borrowman v. Free*, (1879) 4 Q.B.D. 500, 48 L. J. Q. B. 65.

§ 554. When there are two contracts and the buyer fails to take delivery under the first, that is no refusal to accept delivery under the second so as to entitle the seller to rescind.¹

Where property has passed.

The right to rescind under section 55 applies whether the property has passed or not and the property reverts thereon in the latter case in the seller.²

Rights of promisee on repudiation.

If a buyer repudiates the contract, the seller can sue for either damages or the consideration, but not for both.³

The rights of a party electing to avoid the contract for repudiation and his rights if he insists on performance,⁴ are entirely different and incompatible and cannot be asserted simultaneously.⁵

If a party wrongfully repudiates the contract, the other party in a suit for specific performance, can recover damages for loss of the contract and in respect of breaches committed before the repudiation.⁶

Effect of avoiding the contract.
Damages.

It has been held that a party avoiding the contract must, under section 39 read with section 64 of the Contract Act, restore as far as may be any benefit⁷ he has received thereunder,⁸ though under section 75 he can claim compensation for any legal damage suffered. But section 64 does not make it necessary to give compensation for a benefit received which cannot be restored.⁹ The promisee must repudiate the whole contract.¹⁰

Whole contract.

¹ *Rash Behary Shaha v. Nritya*, (1906) 33 C. 477.

² *Buldeo Doss v. Howe*, (1888) 6 C. 64.

³ *Dansk v. Snell*, (1908) 2 Ch. p. 187.

⁴ See § 552.

⁵ *Smith v. Butler*, (1900) 1 Q.B. p. 698.

⁶ *Dominion Coal Co. v. Dominion Iron Co.*, (1909) A.C. p. 311.

⁷ But this does not include any deposit : *Ibrahimhai v. Fletcher*,

21 B. 827; *Manian M. R. Ry.*, 29 M. 118; *Balvanea Appaji v. Whatekar Bira*, 23 B. 56; *Bishan Chand v. Radha*, 19 C. 489; unless perhaps there is a net benefit received.

⁸ *Subba Rau v. Devur Shetti*, 18 M. 126.

⁹ *Skinner v. Jager*, 6 A. 139.

¹⁰ *Anarullah Shaikh v. Koylash Chunder* (1881) 8 C. 118; *Measures v. Measures*, (1910) 2 Ch. 248.

If the breach does not amount to repudiation, the promisee to sue must perform any conditions precedent which devolve upon him.¹ Where breach is not a repudiation.

A contract is *primâ facie* indefeasible and it lies on the party alleging that it is at an end to establish an agreement or special circumstances which justify him in so treating it. If a party goes back from his contract without sufficient justification, as for an alleged repudiation thereof, the other party may treat him as having broken the contract, and if he elects to do so is relieved from further carrying it out or performing any conditions thereunder.² For if a party wrongfully thinking that he is entitled to repudiate, finally renounces the contract and adheres to this, he cannot be heard to say that he was ready and willing to complete his part of it.³

§ 555.
Onus of proving that conduct or acts amounted to repudiation.

One Privy Council ruling does not seem to be in conformity with the principles stated. Where the buyer was to send a ship for goods to be supplied, it was held that there was no need to tender a ship for the goods which they knew could not or would not be supplied,⁴ or to make a formal demand for delivery which has often been refused before. But it seems that the facts amounted to and were treated as a repudiation of the contract.⁵

A party cannot justify his repudiation on the ground that the other party has failed to perform conditions precedent which have been waived,⁶ even if the waiver was Justification of repudiation.

¹ *Roberts v. Brett*, (1865) 11 H. L. C. p. 352.

² *Smith v. Butler*, (1900) 1 Q.B. 694, 699 C.A. cf. *Whitehorn v. Davison*, (1911) 80 L.J.K.B. 431, (1911) 1 K.B. 463.

³ *Ibid* citing *Milling v. Johnstone*, (1886) 16 Q. B. D. p. 467; see *Emery v. Wills*, (1906) A.C. 515, 523.

⁴ Apparently they were ready and willing to do so. If they could not have done so, they could not have recovered: *Forrest v. Aramayo*, (1900) 83 L. T. 335 C.A. But see § 553.

⁵ *Wertheim v. Chicoutimi* (1911) A. C. 301.

⁶ *Prested Miners Gas Co. v. Garner*, (1910) 103 L. T. 223.

the repudiation ¹ and it was made in ignorance of such breach,² but apart from waiver it seems that repudiation may be justified on any grounds discovered after it was notified.³

**§ 556.
Acceptance.**

Acceptance of goods is a waiver of conditions precedent and is discussed under sections 117 and 118.⁴

But there may be a stipulation that the goods may be returned after what would otherwise amount to acceptance.⁵

**Without
knowledge
of wrong
goods.**

There may be acceptance without knowledge of a breach of condition.⁶ And the acceptance of anything tendered under the contract is a bar to a suit for non-delivery, that is in a contract for 'beans' acceptance of a tender of 'peas' precludes any suit for non-delivery of beans⁷ and involves a liability to pay for the peas,⁸ with a right to compensation for loss resulting from the delivery of peas instead of beans.⁷

So under a C. I. F. contract acceptance of a policy was held a waiver of its form.⁹

**Conditional
acceptance.**

Goods may by arrangement be accepted conditionally and the acceptance may in such case be withdrawn on failure of the condition.¹⁰

¹ *Smith v. Butler*, (1900) 1 Q. B. p. 698.

² *Braithwaite v. Foreign Hard Wood Co.*, (1905) 2 K.B. 543.

³ *Wright's case*, (1871) L. R. 7 Ch. 55.

⁴ The Scotch Law differs for the buyer there may timeously reject.

⁵ *Couston v. Chapman*, (1872) L. R. 2 H. L. p. 254; for a resolute condition, see *Lamond v. Davall*, (1847) 9 Q. B. 1030; (right of resale) *Head v. Tattersall*, (1871) L. R. 7 Ex. 7; (right to return) cf. *Cartisles v. Ricknauth*, (1882) 8 C. 809.

⁶ *Wallis v. Pratt*, (1911) A. C. 394.

⁷ *Ibid.* in the C. A. (1910), 108 T. L. R. 118.

⁸ See *Forman v. Liddeşdale*, (1900) A. C. 190, 204, where accepting wrong goods is distinguished from receiving back goods with unauthorised improvements for which there is no liability to pay.

⁹ *Dupont v. British South African Co.*, (1901) 18 T. L. R. 24.

¹⁰ *Lucy v. Mouflet*, (1860) 29 L. J. Ex. 110; *Heilbutt v. Hickson*, (1872) L. R. 7 C. P. 438; *Couston v. Chapman*, L. R. 2 H. L. Sc.250.

So in entire contracts for delivery of a certain quantity of goods by instalments, on failure to complete the contract the buyer may return instalments previously received¹; for unless it is certain that the seller cannot deliver the entire quantity the buyer must receive instalments as tendered.² But if he accepts such instalments by exercising rights of ownership over them so as to preclude their return, he must, in the absence of a contract to the contrary in such entire contracts, accept the rest though not of the contract quality and can only sue for damages.³

§ 556.
When contract entire.

If the promisee has received the whole or any substantial part of the consideration for the promise on his part, a condition precedent loses its character and is reduced to the position of a warranty.⁴ In a recent case⁵ after citing *Behn v. Burness*⁶ for the above proposition, Vaughan Williams, L. J., added, if the promisee receives the thing sold and has enjoyment of it he cannot afterwards treat a descriptive statement as a condition precedent: and after putting it out of his power to return the goods⁷ he cannot reject them. Farwell, L. J., said the power to reject was lost if the buyer disposes of the goods, knowing of the breach of condition or knowingly taking his chance of the goods not being in conformity with the contract. And it seems that the acceptance

§ 557.
Effect of receiving a substantial part of the consideration.

¹ *Oxendale v. Wetherall*, (1829) 9 B. & C. 386, approved in *Colonial Ins. Co. v. Adelaide Ins. Co.*, (1886) 12 A. C. pp. 138, 140.

² See *Brandt v. Lawrence*, (1876) 1 Q. B. D. 344.

³ *Jackson v. Rotax Co.*, (1910) 80 L. J. K. B. 88; but see § 563.

⁴ *Dimeck v. Corlett*, (1858) 12 Moo. P. C. 199; *Ellen v. Topp*, (1851) 6 Ex. 424, 20 L. J. (N. S.) Ex. 241 (apprentice discharged because master relinquished one of his three trades).

⁵ *Wallis v. Pratt*, (1910) 2 K.B. 1003 C. A. 79 L. J. K. B. 1013, 103 T. L. R. 118, revised on another point, (1911) A. C. 984; (seeds of wrong kind accepted, it being impossible to discover the defect, and resold) see *Carter v. Scargill*, (1875) L. R. 10 Q. B. 564.

⁶ *Behn v. Burness*, (1863) 32 L. J. Q. B. 204, 206, citing *Graves v. Legg*, (1854) 9 Exch. 709, 23 L. J. (N. S.) Ex. 228.

⁷ *Quære*, does s. 64 affect this in India; see § 559.

§ 557. must, to have the effect of waiver, be with knowledge or, be optional under the contract.¹

It has been held that this point though not expressly provided for by the Contract Act is not excluded.²

Reason for
the rule.

The reason for this rule has been held to be that where a person has received a part of a consideration for which he entered into the agreement, it would be unjust that because he has not had the whole, he should be permitted to enjoy that part without either paying for it or doing anything for it. Therefore if the party has given an equivalent for the part of the consideration received, he is outside the reason of the rule.³ It has been said⁴ that acceptance of an instalment under an entire contract though paid for precludes the right to reject the rest for breach of condition, but whether the payment was obligatory⁵ or optional the dictum conflicts with the decision of the House of Lords.⁶

Where
equivalent
considera-
tion given.

Substantial.

It is clear at Common Law⁶ that the exception only applied if a substantial portion of the consideration has been executed. It is not easy to ascertain what is a substantial part of the contract, for the decisions are not harmonious.⁷ Where the parties have made an arrangement in substitution of their contract, and that is

¹ See § 564.

² *J. C. Shaw v. Bill*, (1884) 8 M. 38; but see *Carltsles v. Ricknauth*, (1882) 8 C. 801.

³ *General Bill Posting Co. v. Atkinson*, (1909) A. C. 118 H. L.

⁴ *Jackson v. Rotax Co.*, (1910) 80 L. J. K. B. 38 C. A.

⁵ In which case the Contract would obviously be severable.

⁶ See S. of G. Act. s. 11 (c).

⁷ *Ellen v. Topp*, (1851) 6 Ex. 424 (when the master abandoned one of his three trades, his apprentice was held discharged); *Carter v. Scargill*, (1875) L. R. 10 Q.B. 564

(sale of a business price payable in event of net profit of £ 7 per week); *White v. Beaton*, (1861) 7 H. & N. 42; see *Jonassohn v. Young*, (1863) 4 B. & S. 296, 32 L. J. Q. B. 385; *Graves v. Legg*, (1854) 9 Ex. 709, 23 L. J. Ex. 228; *Hoare v. Rennie*, (1860) 29 L. J. Ex. 78; *Pust v. Dowle*, (1863) 32 L. J. Q. B. 179; *Dimeck v. Corlett*, (1858) 12 Moo. P. C. 199; *Bradford v. Williams*, (1872) L. R. 7 Ex. 259; *Stanlon v. Richardson*, (1872) L. R. 7 C. P. 421; *Heilbutt v. Hickson*, (1872) L. R. 7 C. P. 430.

terminated, they are remitted to their legal rights under the original contract.¹

Under the English Law inability to restore the thing purchased unchanged in condition is as a general rule indispensable to the exercise of a right to return it. But if the change has been caused by the legitimate exercise of rights given by the contract, as, for example, by testing the goods in a reasonable manner,³ or not by the buyer, but by an act of God, this will not prevent the buyer from rejecting the goods.

§ 558.
Ability to
restore
thing sold.

Under the Contract Act, however, the rule is stated in section 64, and the party avoiding the contract must restore any benefit received thereunder so far as may be,⁴ and this implies that the English rule as to the right to reject depending on the power to restore, is abrogated, for it seems clear that section 64 covers cases of avoidance under section 39.⁵

Section 64.

The next question to be considered is the effect of the passing of the property in specific goods as a waiver of conditions. It seems that the law in India differs on this point from the English law. Under the English law,⁶ where the contract is for specific goods, the property

§ 559.
Effect of
passing of
the
property in
specific
goods.

¹ *Dominion Coal Co. v. Dominion Iron Co.*, (1909) A.C. p. 306.

² Benjamin 5th Ed. 443. The principle applies to contracts induced by fraud (472) or misrepresentation (443); *Wallis v. Pratt*, (1910) 2 K. B. 1003, distinguishing *Bannerman v. White*, on this ground; *Western Bank of Scotland v. Addie*, (1867) L.R. 1 H.L. (Sc.) 145; *Hunt v. Silk*, (1804) 5 East. 449; *Blackburn v. Smith*, (1848) 2 Ex. 783; *Sully v. Freen*, (1854) 10 Ex. 535; *Clarke v. Dickson*, (1858) E. B. & E. 148, 27 L.J. Q.B. 223; *Savage v. Canning*, (1867) 16 W.R. 133 Ir. R. 1. C.L.

434.

³ *Head v. Tattersall*, (1871) L. R. 7 Ex. 7 (horse); *Urquhart v. Macpherson*, (1878) 3 A.C. 831 P.C.; cf. s. 118 Contract Act; S. of G. Act s. 34, 35; *Lucy v. Mouflet*, (1860) 5 H. & N. 229; cf. *Adam v. Newbigging*, (1888) 18 A.C. 308 (H. of L.), (subsequent depreciation).

⁴ Cf. Indian Specific Relief Act, ss. 36, 38.

⁵ *Subba Rau v. Devur Shetti*, (1894) 18 M. 128; see *Mohori Bibee v. Dharmo Das Ghose*, (1903) 80 C. 539, 547.

⁶ S. of G. Act, s. 11 (c).

**§ 559.
English
Law.**

in which has passed to the buyer, the breach of any condition¹ to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract express or implied to that effect.

Scotch law.

The Indian rule is, it is submitted, similar to the present Scotch law; for in Scotland² failure by the seller to perform any material part of a contract of sale is a breach of contract which entitles the buyer either within a reasonable time after delivery to reject the goods and treat the contract as repudiated, or to retain the goods and claim compensation.

C.L. distinction between specific and non-specific goods.

There was at Common Law a great distinction between a sale of specific goods in which the property had passed and of unascertained goods. If the goods were ear-marked or identified as the subject matter of the sale, the vendee could not at Common Law³ put the breach of a stipulation on the same footing as an unperformed condition; he had generally speaking no right of rejection but only a claim to compensation. "A warranty properly so called,⁴ can only exist where the subject matter of the sale is ascertained and existing so as to be capable of being inspected at the time of the contract,⁵ and is a collateral engagement. But where the subject matter of the sale is not in existence or not ascertained, an engagement that it shall, when existing or ascertained, possess certain qualities, is not a mere

¹ As Benjamin points out if there is an unfulfilled condition the property cannot pass: "condition" should, to conform with the Common Law, be read as "stipulation."

² S. of G. Act. s. 11 (2), but the Scotch law was different before the Act, as the buyer was put to his election to reject *in toto* or to accept and pay the full price:

Benj. 5th Ed., p. 1014.

³ Blackburn 2nd Ed., p. 501; 3rd Ed. p. 541.

⁴ As defined by the S. of G. Act.

⁵ See Smith L.C. Vol. 1 p. 28 (11th Ed.) notes to *Cutter v. Powell*, quoted with approval by Blackburn 3rd Ed. 541; Benjamin 5th Ed. 1002, questions the necessity of being capable of inspection.

warranty, but a condition precedent, because the existence of these qualities being part of the description of the thing sold, becomes essential to its identity, and the vendee can not be obliged to accept and pay for a thing different from that for which he contracted."¹

§ 559.

Benjamin² says that the true theory is that every stipulation as to quality, even in the case of specific goods, is while the contract is and remains an agreement to sell a condition justifying non-acceptance if the condition be unfulfilled, unless there be something in the terms of the agreement to the contrary.³ But if the contract be for specific goods and the property in the goods has passed, no such stipulation will, as a general rule, justify the rejection of the goods. For where the goods are earmarked at the time of the contract the buyer cannot refuse to accept them, because they are not as good as contracted for.⁴ But in the case of unascertained⁵ goods the property cannot pass unless the goods appropriated to the contract conform thereto, or are accepted in fulfilment thereof.

English Law.

The reason given in the cases for this effect of the passing of the property in specific goods is that a substantial portion of the consideration has been received.⁶ But it does not seem to be very forcible⁷ and the fact that the law of Scotland differs, shows that it is not founded on any broad principle.

Reason for the rule.

The rule was at Common Law subject to a contrary intention.⁸

Contrary intention.

¹ Blackburn, 2nd Ed. p. 501; 3rd Ed. 541.

² 5th Ed. p. 998, cited by Blackburn 3rd Ed., p. 542.

³ *Ibid.* disapproves dicta to the contrary in *Heyworth v. Hutchinson*, (1867) 36 L.J. Q.B. 270, and a passage in Chitty, 11th Ed. 425, 12th Ed. 505 which was cited with approval in *re Green*, (1890) 63 L.T. 97, 100.

⁴ Blackburn, 3rd Ed. 540 & 541.

⁵ See Blackburn, 3rd Ed. p. 339, 540.

⁶ *Behn v. Burness*, (1863) 32 L. J. Q.B. p. 206; see § 557; see *Wallis v. Pratt*, (1910) 103 L.T. R. 118.

⁷ See Holmes on the Common Law, p. 331.

⁸ Sm. L.C. 11th Ed. Vol. II, 62; see *Varley v. Whipp*, (1900) 1 Q. B. 513.

§ 559.
Capable of
inspection.

There is some doubt as to whether for the rule to apply the goods must be capable of inspection at the time of sale. The opinion above cited¹ is contradicted by the same learned author in another part of his work.² Benjamin³ considers that the exception is not sound, although in an earlier edition a different view was taken.⁴ In Chitty on Contracts⁵ an opinion is expressed that such an exception exists.⁶ The cases are conflicting.⁷ Blackburn⁸ however supports the exception, citing *Toulmin v. Hedley*.⁹ But this exception seems not to have been recognised in the Sale of Goods Act.¹⁰

Law in
India.

In India¹¹ the law as to conditions which are promises is laid down generally in sections 51–58 of the Contract Act, and two cases relating to sales of goods are dealt with in sections 117 and 118. The first difficulty is the meaning of the word ‘warranty’ as used in sections 109–118.

Meaning of
warranty.

The use of the technical word warranty in the Code has made it difficult to construe its provisions. The term is not defined and it has been used in so many different senses¹² that its use in the Code is particularly unfortunate. When the Contract Act was passed the word had acquired no precise technical meaning in England, and it only

¹ Sm. L. C. 11th Ed., I, p. 28.

² Notes to *Chandelor v. Lopus*, Sm. L. C. 11th Ed. Vol. II, p. 62.

³ Benjamin 5th Ed. p. 1003.

⁴ 2nd Ed. 749, 4th Ed. 941.

⁵ 8th Ed. p. 425, 12th Ed. p. 525.

⁶ This passage was approved in *re Green*, (1890) 63 L. T. 97, 327; see *Dixon v. Yates*, (1833) 5 B. & Ad. 813, 840.

⁷ *Behn v. Burness*, (1863) 3 B. & S. 755 & 756; *Mondel v. Steel*, 1841. 8 M. & W. p. 870 against it; *Heywood v. Hutchinson*, (1867) L. R. 2 Q. B. 447 for the

exception.

⁸ 2nd Ed. p. 207, 3rd. Ed. p. 220, citing S. of G. Act 84 (1) but why?

⁹ (1845) 2 Car. & Ker. 157.

¹⁰ Section 18 rule 1: the view taken by the editors of Blackburn 3rd Ed. 220, is that the rule depends on acceptance, for they cite s. 34. (1) But the C. L. does not seem to have turned on implied acceptance.

¹¹ *Mitchell v. Buldeo Dass*, (1887) 15 C. 1.

¹² See Anson 9th Ed., p. 814.

acquired a technical meaning under the Sale of Goods Act.¹ § 559.

The view taken in Pollock² is that in the Act there is confusion between the two things, condition and warranty ; and he states that 'warranty' in section 117 means a warranty as that word is understood in English law : in section 118 it is used in the wider sense of the English 'condition.' This seems an extraordinary method of construing. Mr. Chalmers observes that the word has two meanings, one as opposed to a condition, which was adopted after much discussion in the Sale of Goods Act ; but there is also a second meaning,³ the term being used to denote any auxiliary stipulation in a contract of sale, and in particular a stipulation relating to the title to, or the quality, condition or fitness of goods contracted to be sold. In this sense, the learned author adds, a breach of warranty may give rise either to a mere claim for damages or to a right to reject the goods and treat the contract as repudiated according as the goods may have been accepted or not. Now this is almost what the Code says follows on a breach of 'warranty' : if the goods are specific, acceptance and delivery and if the goods are not originally specific, acceptance limits the buyer's right to a claim for compensation. It seems that in the Contract Act 'warranty' is always used in the sense of 'condition.'⁴

Meaning
of word
'warranty',
in the Code.

The Indian decisions on the effect of the passing of the property are not uniform. In *Shoshi Mohun Pal*

Effect of
passing of
the property
in India.

¹ Section 62 (1), see *Wallis v. Pratt*, (1911) A. C. 394.

² 2nd Ed. p. 431, 438; but these remarks are not in the 1st Ed.

³ See Chalmers 2nd Ed. p. 169. These sections show the danger of any technical words in a code: see Benjamin p. 566. See for the

various shades of meaning which the word, warranty, has been used to convey, Anson 9th Ed., p. 314.

⁴ Compare the meaning in Scotland S. of G. Act s. 62 "a breach of warranty shall be deemed to be a failure to perform a material part of the contract."

§ 559.
Effect of
passing of
the property
in India.

Chowdhry v. Nobo Kristo Poddar,¹ the plaintiffs sold by sample the whole contents of a certain golah of rice as being of a certain description to the defendants who after paying earnest and taking delivery of part, refused the rest as not being of the description contracted for. There was some delay and then the rest of the rice having been damaged by fire, the plaintiffs sold it and sued for the balance of the purchase money. It was held that although the sale was by sample, the price² showed that there was an implied 'warranty' of quality under section 113, illustration (b), but that as the property in the goods had passed the buyer could only rescind if section 19³ applied; and as the exception⁴ to section 19 covered the case, his only right was to claim an abatement of the price. Section 117 was said not to apply to ascertained goods.⁵

In *Mitchell Reid v. Buldeo Das Khetry*,⁶ it was held that on the sale of ascertained goods, whether the property has passed therein or not, the buyer is entitled to reject the goods if they are not according to the description in the contract, if that description forms an actual part of the conditions of the contract and not something collateral to it. "For the intention of the Legislature was to make the two things (*i.e.*, the right to reject and the passing of the property) wholly independent of one another. A man is not bound, unless he has altered his position by some conduct⁷ of his own, to accept and pay for goods which

¹ (1878) 4 C. 801, *per* Mitter and Prinsep, J. J., Pollock 2nd Ed. 481, treats the case as if the stipulation as to quality, the property having passed, was not intended as a condition and emphasises the part delivery (*sic* acceptance?). But the judgment was not on these grounds.

² Why the price and not the description?

³ Section 19 does not apply to

terms of a contract; *see* § 504 and § 605.

⁴ The contract is not voidable if the party deceived "had means of discovering the truth with ordinary diligence."

⁵ Clearly wrong.

⁶ (1887) 15 C. 1.

⁷ Semble by acts of ownership: but that would be acceptance, or waiver.

are not in accordance with the description of the goods he bargained for." This was said to be shown by section 51 : and it was pointed out, that the right to reject might be lost by the conduct of the buyer, *i.e.*, by waiver thereof, but it is clear from the case that at any rate part delivery if not in progress of the whole, does not constitute waiver.

§ 559.
Effect of
passing of
the property
in India.

The view taken in this case is in accord with the decision in *Buldeo Dass v. Howe*,¹ where it was held that under the Contract Act in all cases of reciprocal promises whether the property had passed or not or whether there had been part delivery in progress of the whole or not, the contract could be rescinded under section 55 for failure to take delivery and pay for the goods within the time fixed, if time were of the essence of the contract. Pontifex, J. held that both section 55 and section 39 applied although the property had passed. The case of *Shoshi Mohun Pal v. Nobo Kristo* was cited in argument.

Curiously enough section 117 was not construed in any of these cases, and only referred to in the first as not applying to ascertained goods, a statement which is obviously wrong.

These two decisions however are not on the same facts. For in *Shoshi Mohun Pal v. Nobo Kristo*, there was a complete executed contract, and in *Mitchell v. Buldeo Dass*² the contract was still executory, the goods being to arrive.³ In England under the Common Law this would, it seems, make a difference.

Apart from questions of waiver it is submitted that acceptance and not the passing of the property is the test provided by the Contract Act, whether the contract be for specific goods, inspected or not, where delivery is also

Acceptance
the only
method of
losing the
right to
reject.

¹ (1880) 6 C. 64, Garth, C. J., L. J. Q. B. 270.
Pontifex, J.

³ Cf. *Toulmin v. Hedley*, (1845)

² For similar facts see *Heywerth v. Hutchinson*, (1867) 36 2 C. & K. 157.

§ 559. necessary,¹ or for unascertained goods, by which to decide whether the right to reject is lost.

Indian rule. It has been seen that this is opposed to the English Common Law, and hence the necessity for two sections in the Act on the point,² for it was necessary to clearly indicate this alteration of the Common Law.³

No doubt the drafting is not unexceptional. But it is clear that section 117 was intended to alter the Common Law rule that once the property had passed in the case of a sale of specific goods, the right to reject is lost, for the original draft was "where a specific article has been sold with a warranty, and the warranty is broken," etc.

It is also clear that section 19 has nothing to do with the case,⁴ for section 113 shows that an implied warranty is not destroyed by inspection.

Distinction
between
conditions
and
warranties
recognised in
India.

The distinction between stipulations the breach of which justifies repudiation, and stipulations the breach of which only gives rise to a claim for compensation, is recognised in India,⁵ but the mere fact that the property has passed in specific goods is not conclusive as to which of these classes any stipulation belongs, though the fact that the goods are originally specific is a material point to consider in deciding to what a term of the contract was intended to amount.⁶

§ 560.
Part
acceptance.

Under the Sale of Goods Act ⁷ if a contract is not severable, acceptance of part of the goods precludes the buyer from rejecting the rest for breach of any condition, unless

¹ Compare the Scotch rule, S. of G Act s. 11 (2).

² Ss. 117, 118.

³ The difficulty felt by the editors of *Cunningham & Shepherd* 10th Ed. p. 335, seems to have arisen because of their omission to consider this point.

⁴ See § 504 and § 605.

⁵ *Mitchell Reid v. Buldeo Doss*, 15 C. I.

⁶ *Heywood v. Hutchinson*, (1867) L. R. 2 Q. B. p. 451.

⁷ Sec. 11 (3) probably founded on *Champion v. Short*, (1807) 1 Camp. 53.

there is a stipulation to the contrary, which must be clear, and the contract complete.¹ § 560.

According to Benjamin² this was the Common Law in cases where restitution was impossible. The section has been said to merely enact the Common Law, but the case referred to the rest of the section and this point was not in question.³ There seems to be no instance of its application at Common Law.⁴

The rule in England only applies where the contract is not severable, and generally speaking a contract for delivery by instalments is not construed as so entire that the acceptance of one delivery precludes rejection of the subsequent deliveries, but there may be an entire contract so that acceptance of one delivery precludes rejection of the rest⁵ but to have this effect the buyer must have rendered the return of the deliveries received impossible,⁶ that is, there must be acceptance beyond mere receipt, for if he has merely received the goods he can return them where the contract is thus entire if the remaining goods are not delivered according to the contract.⁶ Generally the inference is drawn that the contract is severable if the Court finds that separate deliveries were intended.⁷ The rule does not apply

§ 561.
Does not
apply to
severable
contracts.

Severable.

¹ *Bristol etc. Acrated Co. v. Maggs*, (1890) 44 Ch. D. 616.

² 5th Ed. 566, citing *Hunt v. Silk*, (1804) 5 East. 449; *Pust v. Dowie*, (1863) 34 L. J. Q. B. 127, but neither case is to the point.

³ *Per* Vaughan Williams, L. J. in *Wallis v. Pratt*, (1910) 103 T.L.R. 118, revised on other points, (1911) A. C. 934.

⁴ See however dicta in *Hart v. Mills*, (1846) 15 M. & W. 85, where there was acceptance of one out of four dozen of sherry, but as only two dozen were

ordered, it was held that the acceptance did not bind the buyer to take all, though it would have, had only two dozen been sent.

⁵ *Jackson v. Rotax Motor Co.*, (1910) 2 K. B. 937 C. A., but see § 563.

⁶ *Colonial Ins. Co. v. Adelaide Ins. Co.*, (1886) 12 A. C. 128, 138, 140, approving *Oxendale v. Wetherall*, (1829) 9 B. & C. p. 887.

⁷ *Tarling v. O'Riordan*, (1878) 2 L. R. Ir. 82, approved in *Jackson v. Rotax Co.*, (1910) 2 K. B. 937.

§ 561. where the contract is for a number of articles each of which is to be of a particular standard¹ if it is construed as a separate contract for each article.¹

Condition
subsequent.

Nor does it apply where by the contract part acceptance is to proceed fulfilment of any condition,² and part acceptance occurs prior to any breach.

§ 562.
Indian
cases.

In India before the Contract Act, it was held³ that in an entire contract for a large quantity of gunny bags, the buyer could, after accepting part, reject the rest. Macpherson, J. in answer to the argument that part acceptance barred such a right, said that that did not prevent the buyers taking the objection afterwards when their attention was first called to the defect. The view taken was that the buyer could accept any bags which answered to the contract and reject any that did not.⁴ This amounts to treating the contract as consisting of separate contracts for each bag because each one had to come up to the contract standard.⁵

So where the buyer under a contract for an entire quantity accepted part of the goods and rejected the rest, when subsequently tendered, for inferiority, it was held he could do so and need only pay the value of the part accepted,⁶ and no notice was taken of the effect of part

¹ Chitty 15th Ed., 716 ; *Molling v. Dean*, (1902) 18 T. L. R. 217.

² *Carlisle v. Ricknauth*, (1882) 9 C. 801 ; *Buldeo Doss v. Howe*, (1880) 6 C. 64.

³ *Miller v. The Gouripore Co.*, (1871) 8 B. L. R. 285 C. A.

⁴ Cf. *Molling v. Dean*, (1902) 18 T. L. R. 217, where the Court said he could do so, and thereby reduced the damages payable by the seller for his breach of contract, and *quære*, for the converse proposition that the buyer is bound to accept such goods as conform to the contract is clearly

not good law (*Tarling v. O'Riordan*, (1878) 2 L. B. 1r. 82; *Jackson v. Rotax Co.*, (1910) 2 K. B. 937 C.A.), unless the contract so provides: *Brandt v. Lawrence*, (1876) 46 L. J. Q. B. 237 ; *Reuter v. Sala*, (1879) 48 L. J. C. P. 492 ; S. of G. Act 81 (1).

⁵ A method of construction disapproved of in respect to motor horns by the A. C. in *Jackson v. Rotax Co.*, (1910) 2 K. B. 987.

⁶ *Macfarlane v. Carr*, (1872) 8 B. L. R. 459 C. A. 17 W. R. 244 (suit for non-acceptance).

acceptance. In both these cases there were separate deliveries.

§ 502.

Indian cases.

The Contract Act has no provision on the point, save that section 117 enacts that the right to reject is lost by acceptance.¹ It has been held that where bales were delivered separately acceptance of one did not preclude rejection of the rest,² and that part acceptance is not a waiver of conditions precedent.³ The Privy Council held that under an entire contract, where there had been acceptance of part, the buyer could reject the rest.⁴ The report does not show if there was only one delivery and no notice is taken of the effect of accepting part, but the contract was for a large quantity of paddy, and as the decision was after the Sale of Goods Act was passed, it would seem that there must have been separate deliveries ; at any rate, the part accepted had been paid for.⁵ But the judgment laid it down broadly that, the rejected paddy being defective, its tender was not a performance of the contract.

Contract Act.

In a recent case the contract was for 15 bales, each consignment to be considered a separate contract. The sellers tendered 8 and the buyers accepted 2 and claimed to reject the rest, as being of the wrong shipment. It was held that having accepted two knowing them to be of the wrong shipment, they could not reject the rest.⁶

¹ Farwell, L. J., said, s. 35 of the S. of L.S. Act which defines acceptance included acceptance of part: *Jackson v. Rotax Co.*, (1910) 2 K. B. p. 946 *sed quære*.

² *Mitchell v. Buldeo Das*, (1887) 15 C. 1; in *Soshi Mohun Pal v. Nobo Kristo*, (1878) 4 C. 801, no mention is made of part acceptance except as part delivery to pass the property.

³ *Buldeo Doss v. Howe*, (1880) 6 C. 64.

⁴ *Ah Shain Shoke v. Moothia Chetty*, (1890) 27 I. A. 30, 4 C.W. N. 453.

⁵ *Quære*, would the fact that

the sellers had accepted part payment take the case out of the rule; see *General Billposting Co. v. Atkinson*, (1909) A. C. 118 H. L. See § 557.

⁶ *Findlay Muir v. Radhakissen*, (1909) 36 C. p. 748 O. C.; the report is not satisfactory; any waiver as to the first delivery could not affect the second, it being a separate contract (see § 543). It may be that the part acceptance was regarded as showing that a particular shipment was not a condition: but see *Wallis v. Pratt*, (1911) A. C. 934, as to construing *ex post facto*

§ 563.
Breach
after part
acceptance.

Under entire
contracts for
instalments.

Payment for
the part
accepted.

Principle
how far
applicable to
India.

Whether acceptance of part before a breach can be considered as a waiver of any condition in respect of the rest of the goods when deliverable by instalments depends on whether knowledge is necessary for waiver¹; but it seems that where the contract is entire so that acceptance of one delivery precludes rejection of the rest² the buyer has the right merely to receive the first deliveries and to withhold acceptance until the entire quantity is delivered³ and that where this is impracticable the contract cannot be construed as entire but only as severable.⁴ Acceptance of part would seem not to amount to a waiver where the buyer has no right to return deliveries first received if the rest of the goods are not delivered according to the contract ; nor would it be waiver if the parties intended or contemplated that the buyer should use the part first received before the time for the delivery of the rest. It only amounts to waiver where, instead of merely receiving the goods first delivered and making a stand to see if the whole contract is going to be performed, the buyer having no such right under the contract, elects to proceed with it by putting it out of his power to return the goods.⁵

It seems that the principle is that having accepted substantial part performance, the buyer cannot reject the rest of the goods and therefore, if the buyer has given consideration for the seller's part performance, that is paid for the goods, the case is outside the reason for the rule.⁶

The result of the cases seems to be that the rule is applicable in India, and the cases in which it has not

¹ See § 564.

² See *Jackson v. Rotax Co.*, (1910) 2 K. B. 937 C. A.

³ *Colonial Ins. Co. v. Adelaide Ins. Co.*, (1886) 12 A. C. 128.

⁴ This seems to be the effect of *Tailing v. O'Riordan*, (1878) 2 L. R. Ir. 82 approved in *Jackson v. Rotax*; (1910) 2 K. B. 937.

⁵ See § 564.

⁶ See *General Billposting Co. v. Atkinson*. (1909) A. C. 118 H. L. and § 557, but see *contra* per Farwell L. J. in *Jackson v. Rotax Co.*, (1910) 2 K. B. p., 946, but the remarks were *obiter* and the point was not argued.

been referred to are all instances of instalment contracts treated as severable. The rule does not depend on the fact that after acceptance the buyer cannot return the goods¹; if it did, the effect of section 64 of the Contract Act would be to modify the rule in India; but the principle is that if the buyer, not being under any contractual obligation to do so, accepts part of the goods, he must accept the rest if tendered, subject to a counter claim for any inferiority.

§ 563.

Where there is one delivery the buyer must, if he repudiates the contract, do so in *toto*² and cannot pick out some goods and reject the rest unless the contract so provides.

Where one delivery.

In America part acceptance and user before a discovery that the goods are not of the quality bargained for is not a bar to rescinding the contract, though the part consumed must be paid for.³

American rule.

The question whether there can be waiver by acceptance of a benefit under the contract or by treating the contract as subsisting, if the promisee acts in ignorance of a breach of a condition, is not fully discussed by the text writers. Generally⁴ the rule is stated as it was laid

§ 564.
Is knowledge necessary for waiver.

¹ This was Benjamin's (5th Ed. p. 564) view of the Common Law, and seems to have been the view of the M. R. in *Jackson v. Rotax Co.*, (1910) 2 K. B., p. 942 C. A., but the other lords justices did not make this qualification, nor does the S. of G. Act, section 11 (c).

² See *Anarullah Shatkh v. Koy-lash Chunder*, (1881) 8 C. 118; cf. *Miller v. Bradley*, (1889) 39 Mass. 457, where after buying and paying for a cow and some hay, the buyer on receiving the cow and

not the hay, sued for the value of the hay, and it was held that he could not do so: he should have returned the cow and then could have recovered the whole sum paid or if he retained the cow, he should have sued for damages.

³ Beach 185, citing *Shields v. Petter*, 2 Sandf. 262; *Vernede v. Weber*, (1856) 25 L. J. Ex. 326, 1 H. & N. 311.

⁴ Benj. 5th Ed. 562; Addison 10th Ed. 51; Chitty 14th Ed. 615.

§ 564. down *obiter* in *Behn v. Burness*¹ that acceptance of a substantial part of the performance waives a condition precedent. But it was held in the House of Lords that a waiver must be an intentional act with knowledge.² The same view was taken by Peacock C.J. on the analogy of forfeiture of leases.³ It has been held that even after substantial part performance the promisee may either before taking possession or within a reasonable time thereafter, as soon as he discovers the breach, repudiate the contract,⁴ and it is the rule in cases of breach of a condition subsequent that the promisee may repudiate the contract on discovery of the breach.⁵

Substantial
part per-
formance
before
discovery.

Conditions
subsequent.

Rules
deduced.

The real principle seems to be that knowledge is generally necessary, but that if the promisee, after the time when the condition precedent ought to have been performed,⁶ or in cases where he is under no obligation to accept any benefit under the contract or to proceed with it, until the condition be satisfied, accepts any substantial benefit under the contract, this is an implied waiver of the condition *qua* condition. He thereby elects to proceed with the contract and not to take his stand

¹ (1863) 32 L. J. Q. B. 204, approved in *Wallis v. Pratt*, (1910) 2 K.B. 1008 C.A. *per* Vaughan Williams, L.J. (reversed on other points (1911) A.C. 394); followed in *Shaw v. Bill*, (1882) 8 M. 33, approved in *Pust v. Dowie*, (1863) 32 L.J. Q.B. 179 (where there was however knowledge).

² *Earl of Darnley v. London, C. & D. Ry.* (1867) L.R. 2 H.L., p. 57, (waiver of time limit for an award). Fry on Specific Performance 5th Ed. 547, seems to limit this to waiver of time; Cf. as to the knowledge necessary for implied assent. *Jugo Bundhoo v. Kurum*, (1874) 22 W. R. 341, 345.

³ *Turner Morrison v. Ralli*, 2 B.L.R. O.C. 127 (sea worthiness), citing *Roberts v. Brett*, (1865) 11 H.L.C. 337.

⁴ *Carter v. Scargill*, (1875) L. R. 10 Q.B. 564; cf. *White v. Beaton*, (1861) 7 H. & N. 42; see *per* Macpherson J. in *Miller v. The Gouripore Co.*, (1871) 8 B. L.R. 255.

⁵ *Carlisle v. Ricknauth*, (1882) 8 C. 809; see *Bannerman v. White*, (1861) 31 L.J. C.P. 28, approved in *Wallis v. Pratt*, (1910) 2 K.B. 1008 C.A., reversed on other points, (1911) A.C. 394.

⁶ See Blackburn, 2nd Ed. 200; 3rd Ed., 213.

relying on the condition precedent, but chooses to trust to the promisor's promise to perform which is thereby rendered similar to a warranty.¹

§ 564.

But where by the terms of the contract the parties provide that the buyer shall or authorise² the buyer to either accept the whole or any part of the performance of the promisor's obligations or do any act under the contract before the time fixed for the fulfilment of a condition precedent, the promisee's acceptance of any such performance or doing of such act is conditional on the fulfilment of the condition precedent and is not a waiver thereof, and he may nevertheless, if the condition be broken, subsequently on discovery, repudiate the contract,³ though doubtless he must do so promptly. The rule, it seems, applies when the promisee has the option under the contract to accept bills of lading or to insist on actual delivery.⁴

Knowledge of breach.

These propositions were laid down in *Hunt v. Silk*,⁵ and there seems to be no authority against the view there taken. The cases where it was held that knowledge was necessary⁶ only stated the general rule and it has been recently held by the House of Lords that acceptance of goods without knowledge of a breach of condition precedent is a waiver thereof as far as the right to reject is

¹ *Wallis v. Pratt*, (1910) 2 K. B. 1008 C. A. reversed on another point (1911) A. C. 394 H. L.

² Cf. cases of sales of land, *Stevens v. Guppy*, 3rd Russ. 171; *Margravine v. Noel* 1 Mad. p.315.

³ *Roberts v. Brett*, (1885) 11 H. L. C. p. 350, where a material part of the contract was to be performed before the time for giving a bond.

⁴ *Biddell v. Clemens*, (1911) 1 K. B. 984 C. A., since reversed in

H. of L.: sub. nom. *Clemens Horst Co. v. Biddell*, (1912) A. C. 18; 28 T. L. R. 42.

⁵ (1804) 5 East. 449. 7 R.R. 739, approving and distinguishing *Gilcs v. Edwards*, (1797) 7 T. R. 181, 4 R. R. 414; see in U. S. *Mohney v. Reid*, 40 Mo. App. 99.

⁶ *Earl of Darnley v. L. C. & D. Ry.*, (1867) L. R. 2 H. L. p. 57; *Turner Morrison v. Ralli*, 2 B. L. R. o.c. 127.

§ 564. concerned.¹ And acceptance is by statute a waiver of conditions in England² and in India,³ and does not depend on knowledge. Fry⁴ limits the decision in the case of *Earl of Darnley v. London Chatham and Dover Railway*⁵ to conditions of time : and states that there may be waiver before knowledge of the point waived, but it must be by very strong and distinct acts such as are equivalent to a declaration that the purchaser has taken the estate at all possible risks.⁴ He is dealing with equitable doctrines which are not generally applicable to commercial contracts, but it is clear that the statement of law in the Earl of Darnley's case is not of universal application.

Acts consented to by the seller.

It seems from the equitable rule⁶ that any act done before the time for performance of a condition, even if the promisee was not bound to do it by the contract before then, is no waiver if the seller consents to his doing it.

Where payment is to precede inspection or performance.

It is well established that buyers who are bound to pay before they can inspect goods sold are not precluded by such payment from rejecting the goods.⁷ The dictum in a Madras case that after prepayment of the price a seller cannot set up a breach of a condition precedent seems sound.⁸ It clearly would not have this result if payment was to be made before the time for performance

¹ *Wallis v. Pratt*, (1911) A. C. 894; see *per* Farwell, L. J. on C. A. (1910) 2 K. B. 1003 (where seeds were sold as of a particular kind: no examination could detect the fact that they were not of that kind, until they grew up).

² S. of G. Act. s. 11.

³ Contract Act s. 117; (if after delivery) s. 118.

⁴ On Specific Performance, 4th Ed. p. 574; 5th Ed. 657.

⁵ *Earl of Darnley v. L. C. & D. Ry.*, (1867) L.R. 2 H.L. p. 57;

Turner Morrison v. Ralli, 2 B. L. R. o. c. 127.

⁶ *Turquand v. Rhodes*, 16 W. R. 1070 (Eng.); *Burroughs v. Oakley*, 3 Sw. 159.

⁷ *Polengi v. Dried Milk Co.*, (1904) 10 Com. Cas. 42; cf. *Molling v. Dean*, (1902) 18 T. L. R. 217, and in U.S. *Norrington v. Wright*, (1885) 115 U. S. 198 (instalments payment on delivery); *Pierson v. Crooks*, (1889) 115 N. Y. 539.

⁸ *Shaw v. Bill*, (1884) 8 M. 38.

of the condition, but an optional payment if accepted seems to be a waiver of conditions as such. § 564.

In *Biddell v. Clemens*,¹ Kennedy, L. J.,² held that acceptance of bills of lading would not preclude the buyer from rejecting the goods if not in accordance with the contract. The rest of the Court considered that on the assumption³ that the buyer had his option to accept bills of lading or to demand actual delivery of the goods, the acceptance of bills of lading would be waiver of antecedent (though not of subsequent) inspection before delivery just as it would be in the case of acceptance of the goods themselves without inspection.⁴ That is to say it would be a waiver of conditions precedent as acceptance is under section 11 of the Sale of Goods Act, and in India under section 117, if the goods have been delivered, and under section 118.

Acceptance of bill of lading.

The result seems to be that any optional acceptance or any optional proceeding with the contract, unless done with the consent of the seller, is a waiver of a condition precedent as evincing an intention to rely on the promise and not on the performance, and that it is only in the case of a condition subsequent that such action does not amount to waiver.⁵

Knowledge it seems must be such as will enable the party to act effectively; this is the American view,⁵ and as a party alleging waiver must prove it,⁶ and, if he has avoided the contract under a mistaken impression that it has been repudiated by the other party, has himself repudiated it,⁶ clear knowledge of a breach seems essential.

Amount of knowledge necessary.

¹ (1911) 1 K. B. 984 C. A. (C. I. F. net cash) reversed on other points in H. L. 28 T. L. R. 42, (1912) 81 L. J. K. B. 42; (1912) A. C. 18.

² *Ibid.* p. 960.

³ Reversed on this point, (1912) 81 L. J. K. B. 42.

⁴ *Ibid.* p. 950.

⁵ See for the American rule § 501.

⁶ See § 555; for the knowledge necessary for implied assent, see *Jugo Bundhoo v. Kurum*, (1874) 22 W. R. p. 345; see *Dwijendra Narain Roy v. Parnendu*, (1910) 11 C.L.J. 189.

§ 565.
English
rule of
waiver by
mere pass-
ing of the
property.

The English rule that once the property has passed, conditions become similar¹ to warranties,² does not, it seems, conflict with this view of the law, for in the case of goods originally unascertained the promisee had it in his power to satisfy himself that the conditions had been performed before he assented to any appropriation, and in the case of election, no election of goods not answering to the contract passes the property, unless the buyer assents thereto, which, of course, he need not do until he has had an opportunity to examine them. And in the case of the sale of specific goods, the promisee also has his right to examine and satisfy himself as to their quality and condition before he concludes his bargain. This assumes that the goods were capable of examination at the time of the sale, and this point is a strong argument in favour of the general rule being subject to the proviso that the goods must be capable of examination for the passing of the property to be an implied waiver of conditions precedent.³

§ 566.
But no
knowledge
necessary
in case of
repudiation.

But in the case of the repudiation of a contract, although the promisee repudiates in ignorance of the fact that the promisor was unable to perform his contract, he cannot afterwards set that fact up as a defence.⁴

The same rule would apply, it seems, to cases of preventing performance, or of the promisor incapacitating himself from performing his contract.

§ 567.
Resolutive
conditions.

In the case of resolutive conditions from their very nature no acceptance of part performance will amount to a waiver unless there is knowledge of the breach, and the promisee can repudiate the contract on discovery of the breach subject in England to his being able to restore the goods sold,⁵ but in India section 64 would apply.⁶

¹ *Wallis v. Pratt*, (1911) A. C. 894 H. L.

² *Behn v. Burness*, (1863) 3 B. & S. 751; see § 558.

³ See § 559.

⁴ *Braithwaite v. Foreign Hard*

Wood Co., (1905) 2 K. B. 543.

⁵ *Bannerman v. White*, (1861) 31 L. J. C. P. 28, explained in *Wallis v. Pratt*, (1910) 2 K. B. 1003.

⁶ See § 559.

The Indian cases, *Buldeo Doss v. Howe*,¹ and *Carlisle v. Ricknauth*² are instances of such conditions. In the first case goods were sold cash on delivery which was to be made in 10 days. After accepting and paying for part, the buyer obtained a postponement and tendered the price after the extended time. Garth, C. J., held that even if there had been part delivery in progress of delivery of the whole, the seller could rescind on failure of the express condition as to time : the fact that he had received a small over-payment was disregarded : probably it would come under the rule *de minimis*.³ In the other case, the condition was that no similar goods should be sold to rivals within a given time. § 567.

Such conditions are not provided for in the Code : and acceptance under section 117 or 118 does not affect them. But even in the case of such conditions if the promisee has received a benefit under the contract, he must pay for it.⁴ Conditions subsequent.

When there has been a waiver of a condition precedent⁵ by acceptance or part acceptance of goods, the buyer has the right in the case of goods originally specific to claim compensation,⁶ and in the case of goods originally unascertained he has the right, provided he gives notice of his intention to claim within a reasonable time of discovering the breach.⁷ The condition precedent after waiver avails as a warranty, in the English sense, but the condition is not under English law though waived by § 568. Right to claim compensation.

¹ (1880) 6 C. 64.

² (1882) 8 C. 809, *see also* *Turner Morrison v. Ralli*, 2 B. L. R. (O. C.) 127.

³ *See* § 518.

⁴ *Havelock v. Geddes*, (1809) 10 East. 555 (unseaworthy ship used); *see* s. 64.

⁵ If the waiver relates to time, the party proceeding, if intending

to claim compensation, must give notice : Contract Act, s. 55.

⁶ Section 117.

⁷ Section 118; *see* note to that section. *See Macfarlane v. Carr*, (1872) 8 B. L. R. 459 (waiver by 8 weeks' delay); *Farnaro v. Sookdeb*, (1875) 14 B. L. R. 180 (15 days delay).

§ 568. acceptance degraded or converted into a warranty *ab initio* ; the buyer has merely waived the right to avoid the contract.¹

Acceptance. The buyer loses his right to reject the goods by any acts amounting to acceptance,² but such acts do not amount to an abandonment of his remedy by cross action or counterclaim or his right to insist on a reduction of the price,³ or to sue for damages.¹

Where inspection neglected.

Although goods are to be paid for after inspection immediately on their arrival by a steamer, the buyer is entitled to damages, the goods not being up to contract, although he failed to inspect, or had inspected so carelessly as to overlook the defect.⁴ A buyer was held entitled to claim damages under an express warranty as to quality, although the contract provided that his agent was to inspect the goods and might reject or accept them as he pleased, and the agent had inspected and accepted them⁵ ; and a buyer may recover for breach of warranty even after resale if the defect is latent,⁶ unless he has bargained away his right.⁷

Where goods were delivered and accepted after examination, a special bench of the Calcutta High Court held that as a defect was afterwards discovered, which it was impossible to discover owing to the liquid state of the goods on the first examination, the buyers were entitled

¹ *Wallis v. Pratt*, (1911) A. C. 394 H. L.

² For Acceptance see §§613-627.

³ *Sumer Chand v. Ardeshtir*, (1907) W. N. N. W. P. 67, citing *Parker v. Palmer*, (1821) 28 R. R. 313, 4 B. & A. 387 ; see S. of G. Act s. 68 (1) ; *Shoshi Mohan Pal v. Nobo Kristo*, (1878) 4 C. 801.

⁴ *Khan v. Duché*, (1905) 10 Com. Cas. 87 O.C.

⁵ *Bird v. Smith*, (1848) 12 Q.B. 786.

⁶ *Wieler v. Schilizzi*, (1856) 17 C. B. 619, 25 L. J. C. P. 89 ; and see *Gan Kim Swee v. Ralli*, 13 I.A. p. 60 (1886).

⁷ *Wallis v. Pratt*, (1910) 2 K.B. 1008, now reversed by the H. of L. (1911) A. C. 394, but in India s. 113 applies.

to damages for breach of contract.¹ The Privy Council seem to have agreed with this view,² but were of opinion that where goods had been accepted after thorough examination, it required very cogent evidence to show that there had been a breach of warranty, though had the defect been latent and such as could not be discovered on acceptance, such a claim would be sustainable.

§ 568.

Onus of proof after acceptance.

The facts were that catch was bought for export to America and examined in Calcutta: on its arrival in America it was objected to as being of inferior quality and fraudulently packed. The contract was for good Burma catch.³ Their lordships held that after acceptance on examination, the burden of proof was on the buyers to show inferiority: if they sought to show that the article as delivered in New York was the same in quality and condition as to packing as when it was received and accepted by them, they should have given some evidence of what happened to it in the meantime. The whole case turned on this one omission. Their lordships suggested that if the catch had been incapable of examination in Calcutta a different question would have arisen.⁴ There may be a clause in a contract providing for no compensation for breach of its terms, but in order to exclude the common law right to damages, apt words must be used.⁵

Proof of inferiority after acceptance.

The effect of waiver depends on its nature. If all that is waived is the mode of performance as the time⁶ for

Effect of waiver.

¹ If the state of the goods was owing to the seller's fault the buyer could have rejected them on subsequent discovery: *Heilbutt v. Hickson*, (1872) 41 L. J. C. P. 228, and the particular defect—false packing—seems well within Brett, J.'s judgment.

² *Gan Kim Swee v. Ralli*, (1886) 13 I. A. p. 60.

³ *Gan Kim Swee v. Ralli Bro.*, (1886) 13 C. 237 P. C. suit for damages for breach of warranty.

⁴ See *Wieler v. Schilizzi*, (1856) 17 C. B. 619, 25 L. J. C. P. 89.

⁵ *Wallis v. Pratt*, (1911) A. C. cf. *Nelson Line v. Nelson*, (1907) 13 Com. Cas. 104 H. L.

⁶ *Counter v. Macpherson*, (1845) 5 Moo. P. C. C. 83, 108.

§ 568.
Promisor in
default.

performance, or the fulfilment of any other original condition, the promisor must carry out the rest of the contract, and compensate the promisee for the breach of the condition.¹ This is so in all cases where it is the promisor who is in default and the promisee elects or is by law deemed to have elected to proceed with the contract. It has been doubted whether the doctrine of waiver applies to the release of a right of action already vested,² but in India the Code provides that such a right is barred unless notice is given in certain cases.¹

Promisee in
default.

But where it is the promisee who is in default, that is by preventing or hindering performance or by repudiating the contract, the promisor is, if he so elects, discharged from carrying out the contract, and he can sue for damages.³ And all these forms of waiver are analogous to repudiation, that is by preventing or hindering performance or by incapacitating himself from performance, the promisee evinces an intention no longer to be bound by the contract. It seems then that all of these forms of waiver must, to be an absolute discharge if so treated, go to the root of the contract,⁴ just as repudiation must,³ and unless they do so the promisor is only discharged so far as performance is rendered impossible⁴ and where they go to the root of the contract if the promisor elects to

¹ In the case of waiver of time by accepting late performance notice of a claim for compensation must be given at the time of acceptance under s. 55.--a principle unknown to the C.L.; cf. s. 118, under which notice of a claim for compensation must be given within a reasonable time of discovering the breach of warranty.

² *Clydebank Engineering Co. v. Don Jose*, (1905) A. C. p. 14.

³ See § 554.

⁴ See *Panama &c. Tele. Co. v. India Rubber Co.*, (1875) 10 Ch. p. 532, the principle of this is doubted by Fry on S. P. 5th, 523; but it seems that a party is only discharged so far as he is prevented from performance, see Contract Act s. 67, and in the case of repudiation tender is excused because it would be useless: see § 548.

avoid the contract while the promisee is still rendering performance impossible,¹ there is no need to tender performance.²

It seems clear that a condition once waived is always waived ³ *qua* a condition.

A mutual failure to perform concurrent conditions cannot be treated by either party as a waiver of his own obligation. Where the defendant repudiated a contract by the terms of which the plaintiff was to supply a ship by a certain date, both parties being bound to give bonds for due performance within 10 days and both parties having failed to do so, it was argued that both being in default on this point had the effect of striking that covenant out of the contract. It was held that the conditions were not the consideration for each other, for ⁴ there was nothing in the contract making it obligatory on either party to apply to the other for the bond.⁵ Lord Chelmsford considered that the mutual default of the parties had the effect of virtually putting an end to the agreement.

So where neither party was ready to perform concurrent conditions in a contract, it was held that no claim could be made for a breach of the contract.⁶ For where both parties are in default, neither can sue the other where the performance by each party of his undertaking is a condition precedent to the obligation of the other

§ 569.
Condition
once
waived is
always
waived.

§ 570.
No mutual
waiver of
concurrent
conditions.

Mutual
default.

¹ See § 550.

⁵ *Ibid.* p. 353.

² As to the necessity of readiness and willingness, see § 553.

³ *Braithwaite v. Foreign Hardwood Co.*, (1905) 2 K. B. 543; see § 184 and compare cases of promisors incapacitating themselves before the date of performance, cited in § 549.

⁴ *Roberts v. Brett*, (1865) 11 H. L. C. 837.

⁶ *Forrest v. Aramayo*, (1900) 98 L. T. 835 C. A. (launch F. O. B. London, the seller to put it into a ship at certain date, buyer to provide the ship with penalties for delay in delivering the launch, held, as the buyer did not give notice that a ship was ready, he could not claim penalties for late delivery.)

§ 570. party¹; it is otherwise if the promises are independent of one another. Non-performance of one part of a contract is not excused by showing performance of another part thereof.² Any right under a contract can be waived, and so may a statutory right,³ but the ascertainment of goods cannot be waived.⁴

§ 571.
Void agree-
ments.

In certain cases the Contract Act provides that an agreement is void, such as wagering agreements.⁵ So an agreement to do an act impossible in itself is void.⁶ But if the promisor knew, or with reasonable diligence might have known, that his promise was impossible or unlawful, and the promisee did not know, the promisor must make compensation for any loss sustained.⁶

§ 572.
Impossibil-
ity.

The performance of conditions precedent may be excused on the ground of initial or supervening impossibility or illegality.⁷

English law.

The rule in England is different,⁸ for if the promise is in itself possible and performance is not excused by any implied condition,⁹ it is no excuse under the English law that the promisor became unable to perform it by causes beyond his control even amounting to *res major*,¹⁰ for he

¹ *Atkinson v. Smith*, (1845) 14 M. & W. 695, 15 L. J. Ex. 59; *Bankart v. Bowers*, (1865) L. R. 1 C. P. 484.

² Chitty, 15th Ed. 713; *Bird v. Smith*, (1848) 12 Q.B. 786, 12 Jur. 916.

³ *Kashiram v. Pandu*, (1902) 4 Bom. L. R. p. 696; *G. E. R. v. Goldsmith*, 9 A.C. p. 936.

⁴ See § 155.

⁵ Section 30.

⁶ Section 56.

⁷ See § 572 and Contract Act s. 56; Benj. 5th Ed. p. 571, 574 n. This does not in England include impossibility caused by foreign

law: *Barker v. Hodgson*, (1814) 3 M. & S. 267; *Kirk v. Gibbs*, (1857) 26 L. J. Ex. 209, unless both parties are prevented from performing their parts, see *Cunningham v. Dunn*, (1878) 3 C. P. 443 C. A.

⁸ Benj. 5th Ed. 565; Leake Ed. 1878, 719.

⁹ *Baily v. DeCrespigny*, (1869) L.R. 4 Q.B. 180 S. of G. Act ss. 6, 7; *Taylor v. Caldwell*, (1863) 32 L. J. Q. B. 164.

¹⁰ *Wear Commissioners v. Adamson*, (1876) 1 Q. B. D. 548; *Lloyd v. Gubbert*, (1865) L.R. 1 Q.B. 121.

should have guarded himself by his contract and not promised unconditionally.¹ Under the Indian law these rules are altered, and the question is what amounts to an impossibility.² It was held in India that the contract to take delivery within the lay days being absolute, the defendant could only excuse non-performance of his contract by showing it was due either to the default of the captain of the ship or of the plaintiffs themselves. It was the well-known nature of the trade that there would be other purchasers, and it was for the defendant if he desired it to provide for protection in his contract.³ The fact that performance becomes unexpectedly burdensome owing to a declaration of war is no excuse.⁴

§ 572.
Impossibility.

The effect of such impossibility is generally to make the contract void,⁵ the exceptions⁵ being where the part which the party is unable to perform is proportionately inconsiderable and admits of compensation in money, or where such part is considerable or does not admit of

¹ *Paradine v. Jane*, (1648) Aleyn 26; *Taylor v. Caldwell*, (1863) 32 L. J. Q. B. 164; *Baily v. DeCrespigny* supra; *Kearon v. Pearson*, (1876) 81 L. J. Ex. 1 (frost preventing work); *Ashmore v. Cox*, (1899) 1 Q. B. 436 (war); *Jones v. St. John's College*, (1870) L. R. 6 Q. B. 115 (contract to make alterations as ordered by X within a specified time: when X (the defendant) knew the alterations, ordered, could not be made in time; *Thorn v. Mayor of London*, (1876) 1 A.C. 129 (where the work could not be carried out).

² *Bombay and Persia S. N. Co. v. Rubattino Co.*, 14 B. 147, 155 (consent of third person); *Pur-*

sholamdoss v. P., 21 B. 31, (1896) (promise to give in marriage—girl refusing); *Rungasawmi v. Trisa*, (1907) 17 M. L. J. 37 (consent of third party); *Inder Pershad Singh v. Campbell*, (1881) 7 Cal. 474 (land to be cultivated sold at revenue sale); cf. *Goculdas Madhavji v. Narsu*, (1868) 13 Bom. 630, 635; see too Specific Relief Act s. 18; Transfer of Property Act s. 108.

³ *Volkart Bros. v. Nusservanji Jhangir*, 13 B. 392 (1889), (bench).

⁴ *Jugmohundas v. Nusserwanji*, (1902) 26 B. 744.

⁵ See s. 56 of the Contract Act modified by the Specific Relief Act ss. 13, 14, 15, 16.

§ 572. compensation, and the other party elects to waive all performance of or compensation for such part. But if the promisor could have prevented the impossibility, section 56 does not apply, but he must have been reasonably able to do so.¹

Divisible contracts.

But where the contract is divisible so that it consists in effect of two or more separate contracts, the fact that a condition precedent has not been wholly performed does not relieve the other party to the contract from his liability to perform that part of the contract in respect of which the condition precedent does not exist or has been satisfied.²

§ 573.
No implied impossible condition.

The foregoing remarks applied to express conditions, but the law will not imply a condition which is impossible³ where there has been no default⁴; so where the law implies that the delivery, where no time is fixed, must be in reasonable time, the seller is excused if delay was caused by events beyond his control⁵,⁵.

§ 574.
Performance excused.

Performance of a contract of sale is excused⁶ when there has been a breach of a condition precedent which has not been waived⁷; where one party has refused to perform his contract in its entirety⁸; for impossibility under section 64; for failure of consideration; for misrepresentation or for fraud; by novation and by tender, and it may be shown that it has been abandoned by long neglect.⁹ These subjects, except the first two, are part of

¹ *Inder Pershad Singh v. Campbell*, (1881) 7 C. 474.

² See Specific Relief Act s. 16 which modifies s. 56 Contract Act; *Wilson v. London*, (1865) L. R. 1 C. P. 61; *Wilkinson v. Clements*, (1872) 8 Ch. App. 96.

³ *Hick v. Raymond*, (1893) A. C. 22 in lower Court, (1891) 2 Q. B. 626.

⁴ *Hill v. Idle*, (1815) 4 Camp. 327.

⁵ Benj., 5th Ed. 574.

⁶ *General Billposting Co. v. Atkinson*, 62 L. J. Q.B. 638. (1909) A. C. 118 H. of L.

⁷ See post conditions precedent.

⁸ For refusal and as to what failure to perform renders a contract voidable, see § 554.

⁹ *Morgan v. Bain*, (1874) L. R. 10 C. P. 15; *Bond v. Walford*, (1836) 32 Ch. D. 238.

the general law and have no peculiar connection with the sale of goods.

It must be noted that there is no rule requiring writing in the case of a warranty in India.

§ 575.
No need of writing.

On rescission the property in the goods reverts in the seller.¹

If a contract is severable after part is performed on the failure to perform the rest, the promisee may retain the part and recover the part of the price, if paid, for the rest : he is not bound to return the part received.²

§ 576.
Failure to perform whole contract election to accept part.

And a contract originally entire, may be rescinded in part and the money paid for the unperformed part recovered, if the contract is capable of being severed, and the parties by their conduct have given an implied assent to severance, as by the delivery and acceptance of a portion only of goods sold.³ In such a case the buyer can retain the goods received and sue for any overpayment if the price is mathematically divisible.³

In India where part of a contract becomes impossible, no section of the Contract Act applies, but chapter V of the Specific Relief Act may be resorted to and the contract rescinded as to that part.⁴

Part impossible.

Contracts for delivery by instalments⁵ are entire. The seller is therefore liable if he does not make up the whole quantity,⁶ and cannot recover any part of the price but only the value of the part retained,⁷ unless the instalments are to be paid for separately.

¹ *Buldeo Doss v. Howe*, (1880) 6 C. 61.

² *Johnson v. Johnson*, (1802) 6 R. R. 736.

³ *Devaux v. Connolly*, (1849) 8 C. B. 640 ; *Biggerstaff v. Rowatt's Warf*, (1896) 2 Ch. 93 ; C.A. 65 L. J. Ch. 586 ; see also the right to accept an election as to part, § 182.

⁴ *Inder Pershad Singh v. Campbell*, (1881) 7 C. 474.

⁵ *Mersey Steel Co. v. Naylor*, (1884) A. C. p. 439 ; *Honck v. Muller*, (1881) 7 Q. B. D. p. 100.

⁶ *Colonial Ins. Co. v. Adelaide*, (1886) 12 A. C. pp. 138, 140.

⁷ *Oxendale v. Wetherall*, (1829) 9 B. & C. 386.

§ 577. The parties may make any stipulation a condition precedent, and the general rule is that until such condition precedent is performed no property passes.¹
Express conditions.

§ 578. In the interval between the making of the agreement and the fulfilment of the conditions on the performance of which the property is to vest, the buyer has no interest in the goods themselves, and if meanwhile a third party fairly acquires an interest in the goods, the buyer cannot on the fulfilment² or waiver of the conditions deprive him of them.
Before the condition is performed, third parties may acquire a valid title to the goods.

If the seller remains owner of the goods when the conditions are performed, the property passes forthwith³ if the goods are ascertained.

§ 579. The parties frequently agree to conditions precedent to other things besides the passing of the property⁴; for example to the duty of the seller to deliver⁵ or of the buyer to receive or pay for the goods.
Kinds of conditions precedent.

As to payment. The Contract Act provides in section 55 that time is not of the essence of the contract unless that is the intention of the parties. As a general rule the non-payment of the price by a particular date is not of the essence of the contract.⁶ Though the parties may make it so,⁷ even in cases where the property has passed⁸ or the goods have been delivered.⁹

¹ Blackburn, 3rd Ed. p. 209; Benj. 5th Ed., p. 566.

² *Mires v. Solesby*, (1678) 2 Mod. 243.

³ *Evans v. Thomas*, (1608) Cro. Jae. 172; Blackburn, 3rd Ed. p. 210.

⁴ See *South British Fire & M. Ins. Co. v. Brojo N. Shaha*, (1909) 36 C. p. 531.

⁵ See § 158; for a contract allowing the seller to suspend deliveries until freights were low, see *De'Oleaga v. West Cumberland Co.*, (1879) 48 L.J.Q.B. 753.

⁶ *Martindale v. Smith*, (1841) 1 Q. B. p. 395; *Mersey Steel Co. v. Naylor*, (1884) 9 App. Cas. p. 444; see under Instalment Contracts *Rash Behary Shaha v. Nrittya Gopal*, (1906) 33 C. 477 C. A.; *Buldeo Doss v. Howe*, (1884) 4 C. 64; see Blackburn 3rd Ed. p. 485; S. of G. Act s. 10 and s. 121 Contract Act.

⁷ See § 52; *Ryan v. Ridley*, (1902) 8 Com. Cas. 105; *Bishop v. Shillito*, (1819) 2 B. & Ald. 329.

⁸ *Buldeo Doss v. Howe*, (1884) 6 C. 64.

⁹ Section 121.

Payment is usually a condition precedent to the right to possession,¹ and the circumstances may show that it is to the passing of the property,² as where an appropriation is made conditional on payment,³ and where bills of lading and bills of exchange are sent to the seller's agent, this shows an intention to make acceptance a condition precedent to the appropriation.³ So the production of a receipt may be made a condition precedent to the payment of a deposit.⁴

§ 579.
Payment.

Where the parties agree for a formal contract to be drawn up, it depends on the circumstances whether that is a condition precedent to the formation of the contract.⁵

Formal contract.

Conditions as to quality are dealt with under sections 110-116.

§ 580.
Quality.

There is also an implied condition that the buyer has a right of inspection.⁶

Right of inspection.

Conditions as to quantity are discussed under section 119 and under delivery.

Quantity.

The Contract Act in section 55 enacts the rule as to time.⁷ As regards stipulations other than those relating to the

Time.

¹ See under Lien and s. 51 Contract Act, *Shand v. Atmakuri*, 2 M. 193.

² *Godts v. Rose*, (1855) 25 L. J. C. P. 61.

³ *Shepherd v. Harrison*, (1871) 40 L. J. Q. B. 148, 5 H. L. 116; where the bill of exchange was drawn for too large an amount and it was held unless accepted, the bill of lading must be returned as the buyer cannot affirm the contract as to part: *per Kelly*, C. B. 4 Q. B. 196; see § 208.

⁴ *Dias v. Hongkong Bank*, 14 B. 498; but see *Sultan Bibee v. Talukula*, (1893) 3 M.L.J. 9, where a

bond contained a stipulation that all payments must be endorsed on the back, and it was held they could be proved *ali unde*.

⁵ *Santa Fè Land Co. v. Forestal Land, Etc., Co.*, (1910) 26 T.L.R. 584; *Watkinson v. Wilson*, (1911) 55 Sol. Jo. 617 H.L.; see *Whymper v. Buckle*, 3 A. 468; *Shand v. Atmakumri*, 2 M. 193; *Venkatachillasami v. Krishnasawny*, 8 M. 1.

⁶ See § 618.

⁷ *Buddree Doss v. Ralli*, (1881) 6 C. 678; *Juggernath Khan v. Maclachlan* (1881) 6 C. 681.

§ 580. time of payment,¹ time is usually of the essence of the contract, at any rate in mercantile transactions.² Where time is of the essence of the contract the parties cannot obtain, without an agreement to that effect, further time to make the goods conform with the contract.³

Time.

So where a ship was to be chartered after two country voyages, a tender of it after one such voyage was held bad.⁴ The rule laid down in section 55 is in the nature of an explanation to section 47, where it is enacted generally that the performance must be within business hours on the day named, if the promisor has undertaken to perform his promise without application by the promisee. The question has been discussed under delivery.⁵

Shares.

The time fixed for the delivery of shares is generally of the essence of the contract,⁶ for their value fluctuates.⁷ If no time is fixed a reasonable time is of the essence of the contract,⁸ and that is so in all cases.⁹

§ 581.
Sale depending
on act to be
done by
third party.

A sale may by agreement depend on an act to be done by a third party,¹⁰ and this is a condition which must be

¹ *Martindale v. Smith*, (1841) 1 Q.B. p. 395; cf. s. 31, 10 of S. of G. Act; *Mersey Steel Co. v. Naylor*, (1884) 9 App. Cas. p. 444, as to time of payment being essential; *Bishop v. Shillito*, (1819) 2 B. & Ald. 829; *Ryan v. Ridley*, (1902) 8 Com. Cas. 105 (perishable cargo); *Buldeo Doss v. Howe*, (1887) 6 C. 64.

² *Bowes v. Shand*, (1877) 2 Ap. Cas. p. 463; *Barber v. Taylor*, (1839) 5 M. & W. 527; *Reuter v. Sala*, (1879) 4 C.P.D. pp. 246, 249 C. A. (name of vessel and marks to be declared within 60 days); cf. *Paton v. Payne*, (1897) 85 Sc. L.R. 112 H. L. (delivery of printing machine, time not essential).

³ *Buddree Doss v. Ralli*, (1881) 6 C. 678; *Juggernath Khan v. Maclachlan*, (1881) 6 C. 681.

⁴ *Fleming v. Koegler*, 4 C. 237.

⁵ See § 272.

⁶ *Sprague v. Booth*, (1909) A. C. p. 581.

⁷ *Re Schwabacher*, (1908) 98 L. T. 127.

⁸ *De Waal v. Adler*, 12 A. C. 141, 145.

⁹ *Kishan Prasad Sinha v. Purnendu*, (1911) 15 C. L. J. 40.

¹⁰ E.g. measurement, *Mills v. Bayley*, (1863) 2 H. & C. 36, satisfaction of third party; *Grafton v. Eastern Countries Ry. Co.*, (1853) 8 Ex. 699.

complied with before rights depending thereon can be enforced, unless the performance is waived by the other party. The burden of proving compliance or waiver is on the party claiming under the condition.¹ Thus a sale may be made to depend on a valuation by a third party,² and as long as the sale remains executory if the valuers fail or refuse to act there is no contract,³ even if the refusal is unreasonable.⁴ The Court can neither compel a defendant to name a valuer nor compel the valuer to value nor compel the buyer to buy at any other price.⁵ But if there has been delivery and acceptance the buyer must pay the price as estimated by the jury,⁶ and this is also so if the buyer has rendered the valuation impossible.⁶

§ 581.
Sales depending on valuation by third party.

The valuer must act fairly and properly, otherwise the valuation is not binding.⁷ And if the valuer acts in collusion with one party, that party cannot sue on his valuation.⁸ It is no objection that the valuer is a servant of

Valuer must act fairly.

¹ *Brogden v. Marriott*, (1836) 2 Bing. N. C. 478.

² This does not amount to an agreement for arbitration: *Bos v. Helsham*, (1866) 2 Ex. 72, but see *Re Hopper*, (1867) L. R. 2 Q. B. 367; *Re Anglo-Italian Bk.*, (1867) L. R. 2 Q. B. 452. For the distinction see *Re Dawdy*, (1885) 15 Q. B. D. p. 430; *Re Carus Wilson*, (1886) 18 Q. B. D. 7; *Chambers v. Goldthorpe*, (1901) 1 K. B. 624.

³ *Cooverji Ludha v. Bhimji*, 6 B. 523; *Cooper v. Shuttleworth*, (1856) 25 L. J. Ex. 114; *Vickers v. Vickers*, (1867) 4 Eq. 529; see S. of G. Act s. 9; Contract Act s. 32. but see *Smith v. Peters*, (1875) 20 Eq. 511.

⁴ See *Worsley v. Wood*, (1796) 6 T. R. 710.

⁵ See Fry Specific Perf. 4th

Ed. s. 357, 1601; *Wilks v. Davis*, 2 Mer. 507; *Darbey v. Whitaker*, 4 Drew 134; *Vickers v. Vickers*, (1856) 25 L. J. C. P. 287.

⁶ *Clarke v. Westrope*, (1856) 25 L. J. C. P. 287, S. of G. Act s. 9.

⁷ *Emery v. Wase*, 8 Ves. 505; *Chichester v. McIntire*, 4 Bli. N. S. 78; see for the duty of valuers and arbitrators, *Eads v. Williams*, (1854) 4 De G. M. & G. 674, and *Bombay Burmah Trading Co. v. Aga Mahmad*, (1911) 15 C. W. N. 981 P. C.

⁸ *Shipway v. Broadwood*, (1899) 1 Q. B. 369 C. A.; *Batterbury v. Vyse*, (1863) 32 L. J. Ex. 177; see *Panama Co. v. India-rubber Co.*, (1875) L. R. 10 Ch. 515; it seems a party bribing a valuer cannot sue at all: Fry on S. P., 4th Ed., 307.

§ 581.
Valuation by
a party.

one party,¹ for the parties may make one of themselves a judge in his own cause,² but he must act honestly and impartially to the best of his ability and apply his mind to the point for decision.³

It seems an action lies for preventing him from valuing,⁴ and the Court will grant an injunction against a party preventing a valuation.⁵

If the valuers agree to act for reward an action lies for neglect or default.⁶

Architect's
certificate.

It seems that in the absence of strong evidence to the contrary, under such an agreement there is no sale, but only an agreement to sell.⁷ And if the property had passed, it would revert on failure to value.⁷ The contract may depend on an architect's certificate and until that is obtained the contract cannot be enforced,⁸ and when obtained if there is no collusion it is binding.⁹ But it seems that in such cases the arbitrator must act reasonably and fairly.¹⁰

¹ *Echersley v. Mersey Docks*, (1894) 2 Q. B. 667.

² *Sec. of State v. Arathoon*, (1879) 5 M. 173; *Aghore Nauth Bannerjee v. Calcutta Tramways*, (1885) 11 C. 232.

³ *Bombay Burmah Trading Co. v. Aga Mahmad*, (1911) 15 C. W. N. 981 P. C.; see *Re Enock*, (1910) 1 K. B. 327; where the arbitrator was removed.

⁴ S. of G. Act s. 9 (2); *Fry Specific Perf.* 4th Ed. 152; *Smith v. Peters*, L. R. 20 Eq. 511.

⁵ *Smith v. Peters*; (1875) 20 Eq. 511; *Thomas v. Fredericks*, (1847) 10 Q. B. 775.

⁶ *Jenkyns v. Betham*, (1855) 15 C. B. 168; *Cooper v. Shuttleworth*, (1856) 25 L. J. Ex. 114.

⁷ *Benj.* 5th Ed. pp. 145, 146.

⁸ *Morgan v. Birnie*, (1833) 9 Bing. 672; *Clarke v. Watson*, (1865) 18 C. B. N. S. 278; *Roberts v. Watkins*, (1868) 32 L. J. C. P. 291; *Mills v. Bayley*; (1863) 32 L. J. Ex. 179; *Goodyear v. Mayor of Weymouth*, (1865) 35 L. J. C. P. 12; *Richardson v. Mahon*, (1879) 4 L. R. Ir. 486; see *Braunstein v. Accidental Death Ins. Co.*, (1861) 1 B & S. 782 as to 'on proof satisfactory to the directors.'

⁹ *Kuppusami Naidu v. Smith*, (1895) 19 M. 178.

¹⁰ See *Sreegopal Mullick v. Ram Churn*, 8 C. 856; *Cohen v. Sutherland*, 17 C. 919; see *Bombay Burmah Co. v. Aga Mahmad*, (1911) 15 C. W. N. 981 P. C.; but see *Hussey v. Horne Payne*, (1879) 4 A.C. 311.

If a sale is dependent on the approval of the goods by the buyer,¹ the Court will, if possible, presume that the parties meant only what was reasonable, but if the terms are unambiguous, it is not sufficient to allege that the dissatisfaction was unreasonable, improper and capricious, only *mala fides* will affect the case,² and no question of reasonableness arises, but there must be real actual disapproval, and the buyer cannot say he will not go on because he repents of the bargain he has made,³ but provided he acts in good faith, the fact that he magnified defects will not disentitle him to reject the article⁴ and recover any deposit.⁵ But a stipulation that the goods should be approved by the buyer's agent does not necessarily exclude the seller's liability on an express warranty.⁶

§ 582.
Sales dependent on buyer's approval.

So if the performance involves the obtaining of a license, the promisor must obtain it.⁷

The condition on which the sale depends may be the happening of some event. In such a case the promisor is as a rule not entitled to any notice that the event has happened,⁸ unless the promisee can control the happening of the event, or it is one peculiarly within his cognizance.⁹

§ 583.
Happening of an event.

¹ *Secretary of State v. Aarathoon*, (1879) 5 Mad. 173; see *Aghore Nauth v. Calcutta Tramways*, 1885) 11 C. 282; *Bahir Das Chakravarti v. Nobin Chunder*, (1901) 29 C. 306.

² *Stadhard v. Lee*, (1863) 3 B. & S. 364; see too *Andrews v. Belfield*, (1857) 2 C. B. N. S. 779 (contract to satisfy the fastidious taste of the buyer); cf. *Dallman v. King*, (1837) 4 Bing. N. C. 105; *Moffatt v. Dickson*, (1853) 13 C. B. 543.

³ *Haegerstrand v. Anne Thomas S.S. Co.*, (1905) 10 Com. Cas. pp. 70, 72 C. A.

⁴ *Repetto v. Friary S. S. Co.*, (1901) 27 T.L.R. 265 O.C., where

it was said a capricious objection was bad; but see the cases in note 2.

⁵ In India under s. 65.

⁶ *Bird v. Smith*, (1848) 12 Q.B. 786.

⁷ Unless there be an implied condition that the promisee shall. In the matter of an arbitration: *Shell Co.*, (1904) 20 T. L. R. 517.

⁸ 2 Wms. Saund. 62 (a) n. 4; Benj. 5th Ed. 581.

⁹ *Vyse v. Wakefield*, (1840) 6 M. & W. p. 453, citing *Haule v. Hemyng*, (1617) Cro. Jac. 432; see too *Tredway v. Machin*, (1904) 91 L. T. 810 C. A.; *Torrens v. Walker*, (1906) 2 Ch. 166.

§ 584.
Goods to
arrive.
 Double con-
 tingency.

Single con-
 tingency.

May depend
 on arrival of
 the cargo.

Meaning of
 term.

So goods may be sold to arrive,¹ and it is a question of construction as to whether that is a contingency on which the contract depends. The English courts have held that if the language is that the goods are sold "on arrival per ship *A* or *ex* ship *A*" or "to arrive per or *ex* ship *A*,"² it imports a double condition precedent, *i. e.*, that the ship shall arrive and that the goods are on board³; the goods mean goods of the description contracted for; if the goods do not correspond to the contract both parties are discharged.³ Or the contract may show that the arrival of the goods is the only condition precedent⁴ as where the terms used are "to be shipped" or "to arrive."⁵ In such a case⁶ the seller warrants the goods to be as described. But if the language asserts that the goods are on board, *e.g.*, "now on board" the *X*, there is a promise that the goods are on board and the only contingency is the arrival of the ship.⁷

The contingency may be the arrival of the cargo, the name of the ship being in connection with the shipment only, and the condition thus be fulfilled though the cargo, although all of it arrived, had been partly transhipped.⁸

The term means to arrive in the ordinary course of trade, and where the ship was wrecked, although the seller could have forwarded the greater part of the goods in time, it was held that he was justified in selling them

¹ As to the meaning of this word in a contract, see *Montgomery v. Middleton*, (1862) 13 Ir. C. L. R. 173.

² See *Johnson v. M'Donald*, (1842) 9 M. & W. 600, 604, 12 L. J. Ex. 99.

³ *Vernede v. Weber*, (1856) 25 L. J. Ex. 326.

⁴ *Idle v. Thornton*, (1812) 3 Camp. 274.

⁵ *Nicholl v. Ashton*, (1900) 2 Q.

B. 298, (1901) 2 K. B. 126; *Harrison v. Fortlage*, (1896) 161 U. S. 57.

⁶ *Simond v. Braddon*, (1857) 26 L. J. C. P. 198.

⁷ *Hale v. Rawson*, (1858) 27 L. J. C. P. 189; *Simond v. Braddon*, (1857) 26 L. J. C. P. 198; *Gorrissen v. Perrin*, (1857) 27 L. J. C. P. 29 "now on passage."

⁸ *Harrison v. Fortlage*, (1896) 161 U. S. 57.

elsewhere.¹ So where the goods expected to arrive by a particular voyage which was never made, were destroyed, although the seller's agents despatched similar goods by the same vessel on a different voyage, it was held that the buyer could not claim them² even where the seller's agents transhipped the goods from the ship named and they arrived in another boat, it was held the condition was unfulfilled.³ § 584.

There is no need that the goods should be the seller's at the time of the agreement.⁴ And if a man takes upon himself to dispose of goods expected to arrive by a certain ship, as goods over which he has a power of disposal, and the goods afterwards arrive not consigned to him, he cannot import into the contract a new condition, *viz.*, that the goods on their arrival shall prove to be his.⁵ But the arrival of other similar goods with which the seller never affected to deal, will not operate to fix him with any liability^{5, 6}.

Where the seller not the owner.

Disposing of another's goods.

In such cases where the buyer has a right to reject the goods, the seller is not bound to deliver them,⁷ for where contracts depend on contingencies, the conditions are available for both parties, and neither by waiver thereof can fix the other with any liability thereunder.

Mutuality of rights.

It seems an undecided question whether such a contract is a sale or an agreement to sell. Generally it is only an agreement to sell, but if there is an assignment of a bill of lading to the buyer it is, it seems, a

Does the property pass.

¹ *Idle v. Thornton*, (1812) 3 Camp. 274; see *Montgomery v. Middleton*, (1862) 13 Ir. C.L. 173.

² *Smith v. Myers*, (1870) 39 L. J. Q. B. 210, reversed in 41 L. J. Q. B. 91.

³ *Lovatt v. Hamilton*, (1839) 5 M. & W. 639.

⁴ *Hibblewhite v. M'Morine*, (1839) 5 M. & W. 462; *Gorissen v. Perrin*, (1857) 2 C.B.N.S. 681; *Fischel v. Scott*, (1954) 15 C. B. 69.

⁵ *Gorissen v. Perrin*, (1857) 27 L. J. C. P. 29 2 C. B. N. S. 681.

⁶ *Hayward v. Scougall*, (1809) 2 Camp. 56.

⁷ *Lovatt v. Hamilton*, (1839) 5 M. & W. 639; *Vernede v. Weber*, (1856) 25 L.J. Ex 326.

§ 584. sale.¹ The property passes if the bill of lading is taken in the buyer's name, but not otherwise until the bill of lading is assigned to the buyer or the goods are accepted.

When notice of ship's name required.

In such contracts for goods to arrive it is a usual condition that the seller shall give notice of the name of the ship on which the goods are expected as soon as it becomes known to him, and a strict compliance with this promise is a condition precedent.² Where goods are sold to be shipped in an unnamed vessel and the contract is to be void if the ship is lost, it is clear that there must be some definite appropriation of the goods to the contract before the ship containing them comes within the clause as to loss, but it seems that, unless the contract so requires, naming the ship is not essential.³

Contract to be void if ship lost.

Where goods at sea are sold the contract is *prima facie* void if they do not arrive.⁴

§ 585. Arrival within a certain time.

So the contract may make the date of the arrival a condition, and a contingency on failure of which the seller is discharged.⁵ A term that goods are to be shipped within a certain time, is part of the description of the goods, and therefore a condition precedent.⁶ The seller has not launched his case until he has shown that he has tendered what was contracted for.⁷

The phrase means, in the absence of trade usage which is consistent with the contract,⁸ that the goods shall be

¹ *Alexander v. Gardner*, (1835) 1 Bing. N. C. 671; see *Stubbs v. Lund*, 7 Mass. 458.

² *Reuter v. Sala*, (1876) 4 C.P.D. p. 246; see *Busk v. Spence*, (1815) 4 Camp. 329; *Graves v. Legg*, (1854) 23 L.J. Ex. 228, (1856) 24 L.J. Ex. 316 Exch.

³ *Nasservanji v. Volkart*, (1888) 18 B. 15; but see *Dadabhai Hormusji v. Khambatta*, (1897) 22 B. 189, 196; and see *Ashmore v. Cox*, (1899) 1 Q. B. 486.

⁴ *Wyllie v. Povak*, (1907) 12 Com. Cas. 317, 321.

⁵ *Alewyn v. Pryor*, (1826) Ry. & M. 406; cf. *Sooltan Chand v. Schiller* (1878) 4 C. 247.

⁶ See *Alexander v. Vanderzee*, (1872) L. B. 7 C. P. 530, which is practically overruled by *Bowes v. Shand*, (1877) 2 A.C. 455 H. of L.

⁷ *Bowes v. Shand*, (1877) 2 A. C. 455.

⁸ *J. G. Smith v. Ludha Ghella*, (1892) 17 B. 129.

placed on board during the time specified and not that the shipment shall be completed before that time expires.¹ § 585.

These cases cited referred to sales of unascertained goods and it is a different matter if a specific cargo is sold, for then such a clause in England was said to be only a warranty and not a condition.²

But it would seem that in India, where the distinction between sales of specific goods and unascertained goods has not been preserved,³ no presumption would arise and the decision would depend on the intention of the parties.

As to the right to make a second tender in such cases, see *ante*.⁴

Delivery in the whole of November on seven days On notice.
notice from the buyer means the buyer has the right of fixing the particular time.⁵

"Monthly shipments" was held to mean at intervals of a month more or less, regard being had to a reasonable time being allowed for finding steamers.⁶ Monthly shipments.

A letter stating a ship would be ready to load in or about 12th, is not a promise, and no estoppel arises.⁷

The terms "shipment made or to be made and bills of lading dated during December or January" were held to be a condition precedent,⁸ as being important for re-sales.

Clearance not later than 31st of May was held to mean Clearance.
"clearance" given by the customs in accordance with the practice of the port.⁹

¹ See *Alexander v. Vanderzee*, (1872) L. R. 7 C. P. 530, which is practically overruled by *Bowes v. Shand*, (1877) 2 A. C. 455 H. of L.

² *Gattorno v. Adams*, (1862) 12 C. B. N. S. 560; see *Kidston v. Monceau*, (1902) 7 Com. Cas. 82 (as to specifications to be delivered).

³ See § 559.

⁴ See § 184; *Ashmore v. Cox*, (1898) 4 Com. Cas. 48, (1899) 1 Q. B. 436.

⁵ *Juggernath Khan v. Maclachlan* 6 C. 681.

⁶ *Volkart Bros. v. Rutnavelu*, (1894) 18 M. 63.

⁷ *Beyts Craig & Co. v. Martin*, (1892) 16 B. 389 O. C.

⁸ *Re General Trading Co.*, (1911) 16 Com. Cas. 95.

⁹ *Thalmann v. Texas Mills*, (1900) 16 T. L. R. 460 C.A., 82 L. T. 833, 5 Com. Cas. 321.

§ 585.
Specifications.

The contract may make the delivery of specifications of the goods within a certain time a condition, but it is not a condition if the time for delivery is indefinite, and the buyer cannot repudiate for delay in delivery unless so late as to make it impracticable in a business sense.¹

Certificate.

A certificate as to the goods may be a condition ; where maize was sold, a certificate from the Chamber of Commerce that it was fit for export to be attached, it was held that a tender of maize out of a larger bulk with a certificate which did not show to what part of the bulk it related was invalid.²

§ 586.
Mode of shipment.

So the place or mode of shipment may be a material part of the contract.³ Where the contract is to import goods by a named ship goods obtained elsewhere do not fulfil the contract,⁴ for *ex* a certain ship usually means that the goods are really landed from that ship,⁵ but it is not necessary that the seller should himself ship the goods.⁶ On the same principle it has been held that an importing firm which accepts a commission to order out goods at a fixed rate and undertakes that they shall be invoiced to the person giving the order at that rate, does not (in absence of proof of usage to the contrary) fulfil his contract by obtaining goods answering to the terms of the order from another firm in Bombay and tendering them.⁷ The custom of trade if there be one, ought properly to be invited to solve such a question ^{7,8}.

¹ *Kidston v. Monceau*, (1902) 7 Com. Cas. 82, 18 T. L. R. 320 ; cf. *in re Carver*, (1911) 17 Com. Cas. 59.

² *Re an Arbitration between Reinhold and Hansloh*, (1896) 12 T.L.R. 422 D. Ct. ; cf. *Buchanan v. Avdall*, 15 B.L.R. 276.

³ *Bowes v. Shand*, *supra*; see *Nusservanji v. Volkart*, (1888) 13 B. 15 (July-Aug. shipment).

⁴ *Biharilal v. Madhusudan*, (1869) 2 B. L. R. O.C. 154.

⁵ *Robertson Gladstone v. Kashtury Mull*, (1869) 3 B. L. R. O.C. 103.

⁶ *Ashmore v. Cox*, (1899) 1 Q. B. 436.

⁷ *The Bombay U. M. C. v. Doolabram*, (1887) 12 B. 50.

⁸ *Johnson v. Raylton*, L. R. 7 Q. B. D. 438.

If delivery is to be from alongside, that is a condition precedent.¹ Where the contract provides for the mode of shipment the buyer cannot demand any other kind of delivery, thus on a contract to deliver F. O. B. a foreign ship, the buyer cannot demand delivery at the port of shipment to himself or a transfer of the goods into his name in the books of the warehouse where they are lodged.²

§ 586.

Buyer cannot vary mode of delivery.

So the parties may stipulate that no other goods of the same kind are to be sold to their rivals within a certain time and on breach of such condition may, though part of the goods has been accepted previous to the breach, refuse to accept the rest.³ As to what amounts to a breach of such a condition see *Braithwaite v. Foreign Hardwood Co.*⁴

§ 587.

No goods of same kind to be sold to rivals.

A future event can be warranted.⁵ And the warranty may be limited to defects pointed out within a particular time.⁶

§ 588.

Future event.

Where a manufacturer sells goods to middlemen with conditions attached to resales, a retailer with notice of such conditions is not bound thereby, as there is no contract between the seller and the subsequent buyer and conditions cannot be attached to goods apart from contract.⁷ It was held in England that such a contract is binding between the original purchaser and the seller.⁸

§ 589.

Conditions attached re-sales.

¹ *Jugmohandas v. Nusserwanji*, (1901) 26 B. 744.

² *Wackerbarth v. Masson*, (1812) 3 Camp 270, 272 n.

³ *Carlisle v. Ricknauth*, (1882) 8 C. 901.

⁴ (1905) 2 K B. 543 C. A.; 74 L. J. K. B. 688.

⁵ *Liddard v. Kain*, (1824) 3 L.J. (O.S.) C.P.246, 2 Bing.183; *Eden v. Parkinson*, (1781) 2 Dough. 733; Benjamin on 'Sale' 4th Ed. 619. Sm. M.L. 11th Ed. 699; *Chapman v. Gwyther*, (1866) L.R. 1Q.B. 463.

⁶ *Chapman v. Gwyther*, supra;

Smart v. Hyde, (1841) 8 M. & W 723; *Bywater v. Richardson*, (1884) 1 A. & E. 508.

⁷ *McGruther v. Pitcher*, (1904) 2 Ch. 306 A.C., approved in *Taddy v. Sterious*, (1904) 73 L. J. Ch. 191, 1 Ch. 354 O. C.; *National Phonograph Co. v. Edison*, (1908) 1 Ch. 835 C. A.

⁸ *Elliman v. Carrington*, (1901) 2 Ch. 275 (not to resell below a fixed price); *National Phonograph Co. v. Edison*, (1908) 1 Ch. 835 A. C. (not to sell to persons on the black list).

§ 589. But semble such a contract is in restraint of trade and void under section 27 of the Code.¹ Different considerations might arise in the case of sales to factors on conditions as to resales.²

A sale may be made with a condition as to subsequent purchases, which can be enforced.³

A receipt given for the price of pictures describing them as "by" an artist, is not a warranty that they are by that artist.⁴

§ 590.
Effect of
express
condition or
warranty
on those
implied by
law.

Where the parties have come to an express contract none can be implied⁵; and where the parties have expressed in words or acts the condition or warranty by which they mean to be bound, any implied condition or warranty inconsistent therewith is excluded,⁶ and an express warranty is never extended by implication.⁷ But this does not apply where the express provisions appear to have been superadded for the benefit of the buyer,⁸ nor does an express condition or warranty negative those implied by law unless it is inconsistent therewith.⁹ A clause negating any responsibility on the part of the seller,¹⁰ unless the words are apt,¹¹ or stipulating for an allowance

¹ See *Urmston v. Whitelegg*, (1891) 7 Times L.R. 295; *Hilton v. Eckersley*, (1856) 6 E. & B. 47; *Mogul S.S. Co. v. McGregor*, (1892) A. C. 25, pp. 46, 48.

² See *National Phonograph Co. v. Edison*, (1903) 1 Ch. 335 C. A.

³ *Grande Maison D'Automobiles v. Beresford*, (1909) 25 T. L. R. 522 C. A. (purchase of a motor car on condition that if any new car be bought, it should be bought through the purchasers).

⁴ *Hyslop v. Shirlaw*, (1906) 7 F. 875

⁵ *Cutler v. Powell*, (1795) 6 T. R. 320.

⁶ *Parkinson v. Lee*, (1802) 2 East. 314; *DeWitt v. Berry*, (1890) 134 U. S. 306; *McClelland v.*

Stewart, (1883) 12 L. R. Ir. 125.

⁷ *Dickson v. Zizania*, (1851) 10 C. B. 602, 20 L. J. C. P. 72.

⁸ *Mody v. Gregson*, (1864) L.R. 4 Ex. p. 53; app. in *Drummond v. Van Ingen*, (1887) 12 A.C. p. 294; *Bigge v. Parkinson*, (1862) 31 L.J. Ex. 301.

⁹ See S. of G. Act, s. 14 (4) s. 55.

¹⁰ But see § 522; *Gorton v. McIntosh*, (1883) W. R. 103 C. A. (English) (no allowance for imperfections).

¹¹ *Wallis v. Pratt*, (1911) A. C. 934 Contract Act s. 113; see § 522; cf. *Prince of Wales Dry Dock Co. v. Fownes*, (1904) 90 L. T. 527. as to excluding C. L. liabilities.

for inferiority in quality,¹ or excluding the right of rejection or providing for arbitration in case of dispute,² does not exclude implied conditions.³ § 590.

In America an express warranty excludes an implied warranty.⁴

The reason given judicially for the implication of conditions is that such implications are made with the object of giving efficacy to the transaction, and preventing such a failure of consideration as cannot have been within the contemplation of either side.⁵ It follows from this that the Common Law will not imply a "warranty," for *ex hypothesi* a breach would not cause a failure of consideration.⁶ § 591.
Implied conditions.
Principle.

As regards implied conditions⁷ it may be observed that the Code does not limit such implication to cases of unascertained goods, and apparently they arise also in respect of specific goods. § 592.
Applies to specific goods.

An implication of a warranty or condition may be negatived or varied by express agreement, by the course of dealing between the parties, or by usage, if the usage be such as binds both the parties,⁸ and may be waived. § 593.
May be varied by the parties.

¹ See § 523; *Azémar v. Casella*, (1867) L. R. 2 C. P. 677.

² *Vigers v. Sanderson*, (1901) 1 K. B. 608; see *Bombay Burmah Trading Co. v. Aga Mahomed*, (1911) 15 C. W. N. 981 P. C.

³ Neither express nor implied conditions are affected by any fresh and not inconsistent term added after the contract is complete, as where after sale the seller agreed to make it subject to a Vet's certificate; *O'Grady v. Herbert Winn*, (1912) 9 A. L. J. 285.

⁴ *Malsby v. Young*, 104 Gr. 205; *Recves v. Byers*, 155 Ind. 535; but see *Bloomington v. Hewitt*, (1899) 40 Ap. Div. (N. Y.) 208, 170 N. Y. 568.

⁵ *The Moorcock*, (1889) L. R. 14 P. D. p. 68; see § 62.

⁶ Benj. 5th Ed. p. 673; and see § 62.

⁷ All the so-called "warranties" in the Code are in the absence of agreement "conditions" in the English sense.

⁸ See § 590; *Re Walkers*, (1904) 2 K. B. 152; cf. S. of G. Act, s. 55.

§ 594.
Code not
exhaustive.

The Code is not exhaustive in its provisions as to warranties. It does not enumerate all the implied warranties, as a warranty as implied under the Merchandise Marks Act.¹

Where compliance with a statute is a condition precedent.

As Blackburn² states there are cases in which compliance with the provisions of a statute may be a condition precedent to the right to recover the price of goods sold. If a sale without compliance with the requirements of a statute is prohibited, no action for the price is maintainable.³ But if there is no express prohibition, but only a penalty imposed,⁴ then if that penalty was solely for the purpose of the raising or protection of the revenue,⁵ an action for the price will lie; but if it was for the protection of buyers or consumers or for some object of public policy, it will not.⁶

Compliance with a statute.

The conditions ordinarily implied in contracts of sale will next be considered.

§ 595.
Title.

As has been observed before the essential element of a sale is that there should be a transfer of the absolute or general property in the thing sold from the seller to the buyer; it would logically follow that by the very act of selling the seller undertakes to transfer the property in the thing, and warrants his title or his ability to sell. This was considered by Benjamin⁷ to be the Common Law, but the point was open to doubt.

¹ Act IV of 1889 s. 17.

² 3rd Ed. 263; *Lightfoot v. Tenant*, (1801) 1 B. & P. 551; *Betts v. Armstead*, (1889) 20 Q.B.D. 771; *Pain v. Boughtwood*, (1893) 24 Q. B. D. 353.

³ See *Smith v. Mawhood*, (1845) 14 M. & W. 452.

⁴ *Melliss v. Shirley Local Board*, (1885) 16 Q. B. D. 446 C. A.; *Victorian Daylesford Syndicate v. Dott*, (1905) 2 Ch. 624.

⁵ *Johnson v. Hudson*, (1809) 11

East. 180, (no license to sell tobacco); *Brown v. Duncan*, (1829) 10 B. & C. 93.

⁶ *Cundell v. Dawson*, (1847) 4 C. B. 376 (selling coals without a ticket of quality and weight); *Knight v. Bowers*, (1868) 14 Q.B.D. 845; *Cope v. Rowlands*, (1886) 2 M. & W. 149 (broker without license); *Bensley v. Bignold*, (1822) 5 B. & Ald. 335 (printer omitting to put his name on book).

⁷ Benj. 5th Ed. p. 597.

Warranty.

If the buyer, or any person claiming under him, is, by reason of the invalidity of the seller's title, deprived of the thing sold, the seller is responsible to the buyer, or the person claiming under him, for loss caused thereby, unless a contrary intention appears by the contract.

Section 109.
Seller's responsibility for badness of title.

The section differs widely from the English Act.¹ In India the buyer or any person claiming under him, can only claim for loss caused by being deprived of the thing sold. This rule is similar to the French and the Civil Law under which there is no warranty of title but an obligation to deliver and a guarantee against eviction.² It is similar to a covenant for quiet possession rather than the equivalent of a covenant of title.³

Differs from English Law.

It has been held however that under this section the old English maxim *caveat emptor* seems so far at least as concerns title to be excluded.⁴ But the section is not, it seems, as wide as that, though the Privy Council appear to have considered that the law was, the section not being exhaustive.⁵

Caveat emptor.

The English law as enacted by the Sale of Goods Act, provides⁶ that, subject to a contrary intention,⁶ there is an implied condition on the part of the seller that he has a right to sell, or in the case of unascertained goods that he will have the right to sell.⁷ It follows that if the buyer has accepted the goods or, in the case of specific goods, the property has passed, he can only sue for damages. The covenant will be broken if at all, at the time when the property is intended to pass, and without any eviction of

Implied condition of right to sell under the Sale of Goods Act.

¹ As to immovable property see Transfer of Property Act, IV of 1882 ss. 55 (2), 66 (a), 120.

(1877) 2 B. 258 O. C.

² Chalmers 5th Ed. p. 31.

⁵ *Dorab Ally Khan v. Executors of Khajah*, (1878) 3 C. 806 P. C.

³ Pothier 'Contract de Vente' Nos. 48, 82.

⁶ Section 12.

⁴ *Framji Besanji v. Hormasji*,

⁷ *Eichholz v. Bannister*, (1864) 34 L. J. C. P. 105.

§ 595. the buyer; and he can avoid the contract and sue for damages for breach thereof.¹

Common
Law rule.

At Common Law the rule of *caveat emptor* applied, but the exceptions had well nigh eaten up the rule.² Generally speaking a warranty of title was implied unless the circumstances rebutted it.³ The law, however, was in an uncertain state, although *Eichholz v. Bannister*³ had gone far towards the establishment of a satisfactory rule

Previous
law in
India.

Before the Contract Act it was held in 1867 that the buyer may at once bring an action on a warranty of title,⁴ and an advertisement for sale was held to be an implied warranty of title.⁵

Buyer need
not take
another's
goods.

In India it would seem that the buyer, if the seller at the time when the property was intended to pass, had no title, could, unless a contrary intention appeared from the contract, avoid the sale. The section is, apparently, not exhaustive, and a buyer could not be compelled to accept goods with notice that the seller had no title, and to commit conversion in respect of them, with the not-altogether satisfactory remedy against the seller in case of actual eviction. Plainly nothing could be more untenable than the pretension that if *A* promised to sell 100 quarters of wheat to *B*, the contract would be fulfilled by the transfer not of the property in the wheat, but of the possession of another man's wheat.⁶ If the seller knew he had no title and concealed that fact from the buyer,

¹ Benjamin 5th Ed. p. 598 ; *Turner v. Moon*, (1901) 2 Ch. 825, 70 L. J. Ch. 822.

² *Sims v. Marryat*, (1851) 17 Q.B. p. 291 (sale of copyright).

³ *Eichholz v. Bannister*, (1864) 17 C. B. N. S. 708 (sale in a shop); cited in *Framji Besanji v. Hormasji* (1877) 2 B. 258, 263.

⁴ *Syud Sayef Ali v. Syud Mahomed*, 7 W. R. 196.

⁵ *Rajah Nil Monee Singh v. Gordon*, (1865) 9 W. R. 371.

⁶ Benj. 5th Ed. p. 598; see *Ramdeo v. Cassim*, 21 C. 178 ; but although the seller has no goods, but is ready to tender goods which he can obtain from a third party, a suit for non-acceptance lies : *Cohen v. Cassim Nana*, 1 C. 264.

the contract could be rescinded for fraud.¹ And it seems that by selling the seller represents that he has power to do so within section 18, and the buyer can rescind and recover any money paid as money paid and received to his use,² making what restoration he can under section 64.

§ 595.

The Sale of Goods Act provides an implied warranty that the buyer shall have and enjoy quiet possession of the goods. A covenant for quiet enjoyment is an assurance against the consequences of a defective title and of any disturbances thereunder.³ The section is couched in wide terms, but must be reasonably construed so as to exclude the tortious acts of strangers.⁴

§ 596.
Quiet
enjoyment.

Apparently this warranty found no place in the Common Law.⁵

Under section 109 it would seem that the tortious act of a stranger would not give rise to a claim against the seller, and there is no warranty for quiet enjoyment, except in the case of actual eviction.

Tortious
acts of
strangers.

Under the Sale of Goods Act there is an implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party, not declared or known to the buyer at the time of the sale. A breach of this warranty will occur when the buyer discharges the amount of the encumbrance.⁶ The Code makes no similar provision.

§ 597.
Freedom
from
charges.

Apparently this warranty was unknown at Common Law.⁷

¹ Benj. 5th Ed. 598.

² *In re Nursey Spinning Co.*, (1880) 5 B. 92.

³ See *Howell v. Richards*, (1809) 11 East. p. 642; *Baynes v. Lloyd*, (1895) 1 Q. B. p. 824.

⁴ Benj. 5th Ed. p. 678.

⁵ Benj. 5th Ed. p. 674; see however Chalmers' 2nd Ed. p. 26.

⁶ *Collinge v. Heywood*, (1839) 9 A. E. 633; *Hughes Hallett v. Indian Mammoth Gold Mines*, (1882) 22 Ch. D. 561.

⁷ Benj. 5th Ed. p. 674, where the view expressed in Chalmers 2nd Ed. 26 is criticised; see too Chalmers 5th Ed. p. 81.

§ 597.
Freedom
from charges.

The English provisions seem to refer to the case of a buyer in possession of the goods but precluded from free enjoyment owing to some charge thereon. If no possession is given there has been no delivery.¹ It seems clear that a sale of goods is not performed by delivering goods subject to charges, and that to do so is a breach of the contract for which damages can be claimed. And the payment of charges which must be paid before the seller can give delivery is part of the seller's duty to deliver.² Clearly the buyer could refuse to accept goods subject to a charge, as not being what he contracted for.³ If he has accepted them, a suit for damages for breach of a contract to deliver goods free of charges will lie,³ for the goods would not be as described. Further, if the buyer pays an encumbrance on the goods, it seems there is a *quasi* contract with the seller to refund such compulsory payment.⁴

The Privy Council considered that whether there was an implied warranty of title on the sale of chattels was uncertain in India, and at Common Law, citing *Eichholz v. Bannister*⁵ and Benjamin, 2nd Edition, page 511, and held that there was no implied warranty when a sheriff sold the right title and interest only of the judgment debtor.⁶

§ 598.
Circum-
stances
rebutting
implica-
tion.

There are circumstances in which no inference of warranty of title arises, as on the sale of a forfeited pledge by a pawnbroker,⁷ or of goods taken in execution by a sheriff,⁸ who does not warrant title, yet he does undertake that he

¹ *Clemens v. Biddell*, (1911)
1 K. B. 934.

² *Playford v. Mercer*, (1870)
22 L. T. 41.

³ See *Ramdeo v. Cassim*, 21 C.
173, where it was held a delivery
order meant an accepted delivery
order and not one subject to
charges.

⁴ See Contract Act s. 69.

⁵ 34 L.J.C.P. 105.

⁶ *Dorab Ally Khan v. Executors
of Khajah*, (1878) 3 C. 806 P. C.

⁷ *Morley v. Attenborough*, (1849)
3 Ex. 500, 77 R. R. 709.

⁸ *Ex parte Villars*, (1874) L. R.
9 Ch. Ap. 432.

is acting within his jurisdiction,¹ and if he sells *ultra vires* his liability is governed by the law relating to the sale of chattels.¹ § 598.
Sales by
sheriffs.

If the sheriff or the execution creditor not only does not disclaim a warranty but expressly asserts a title to the goods, there is no reason why the sheriff or the execution creditor, if he is responsible for the assertion, should not be held bound by such warranty at least to this extent that the sheriff or the execution creditor, whoever has the proceeds of the sale in his hands, is bound to restore it to the purchaser, in case it has turned out that the purchaser has not got that for which he paid.² In a later case it was said that *Framji Besanji's case*³ was decided on the ground that the sheriff was in fact the agent of the execution creditor and guaranteed the sale.⁴

Where a bank presents a bill of exchange with bills of lading annexed, it is not taken to guarantee that the latter are genuine.⁵ Bank present-
ing bill of
lading.

The contract may exclude any covenant of title, as where a buyer transferred his bargain such as it was, and the purchaser gave him £5 "to stand in his shoes."⁶ Warranty
excluded by
the contract.

So too in the case of a sale by a master of a ship, the master sells in his special character as master and not as owner.⁷ Sales by
masters of
ships.

So in a sale of a patent, the seller does not warrant that the patent is free from intrinsic defects that might make it voidable or defeasible,⁸ or that it is new,⁹ but only that he is the owner of the patent. Sale of
patent.

¹ *Dorab Ally Khan v. Executors of Khajah*, (1878) 5 I. A. 116 S. C. 3 C. 806.

² *Framji Besanji v. Hormasji*, (1877) 2 B. 258 O.C.

³ 2 B. 258.

⁴ *Pachayappan v. Narayana*, (1887) 11 M. 269, bench.

⁵ *Leatham v. Simpson*, (1866) L.R. 11 Eq. 398; *Baxter v. Chapman*, (1874) 29 L. T. 642.

⁶ *Chapman v. Speller*, (1850) 19 L. J. Q. B. 241, 14 Q. B. 621; *Baguley v. Hawley*, (1867) L.R. 2 C. P. 625.

⁷ *Page v. Cowasjee*, (1866) 8 Moo. P. C. N. S. 499 L. R. 1 P. C. p. 144.

⁸ *Hall v. Condor*, (1857) 2 C.B. N. S. 22, 26 L. J. C. P. 138, 288.

⁹ *Smith v. Neale*, (1857) 2 C.B. N.S. 67, 26 L.J. C.P. 143.

§ 598. If the buyer obtains goods from a seller without title and subsequently pays the true owner, the seller cannot sue for the price.¹

Remedy. The remedy under the section and generally is an action for unliquidated damages and not for the price. This conforms with the view taken by Benjamin² of the Common Law which is adopted in the Sale of Goods Act.³

Implied warranties in America. Under the American law the vendor warrants by implication the existence of the thing sold,⁴ and that the title to the property is in his possession.⁵

Section 110. Establish-ment of implied warranty of goodness or quality. **§ 599.** An implied warranty of goodness or quality may be established by the custom of any particular trade.

There is a similar provision in the Sale of Goods Act, section 14 (3). Both rules are founded on *Jones v. Bowden*.⁶

Implied condition of quality. It must be remembered that the Act by section 2 excludes from its operation trade usages.

Subject to trade usages. But a usage must be proved unless established by judicial recognition, and must conform to the rules for usages.⁷ "If a custom went the length of saying that there should be no remedy for any variation in the quality contracted for, it would of course be unreasonable, for it would absolutely alter the nature of the contract."⁸

¹ *Dickenson v. Naul*, (1833) 4 B. & Ad. 688; *Allen v. Hopkins*, (1844), 13 M. & W. 94.

² 5th Ed. p. 31.

³ S. of G. Act s. 12; see Chalmers 2nd Ed. p. 26.

⁴ Page § 164; *Meyer v. Richards*, (1895) 163 U.S. 385; so in sale of book accounts there is a warranty that they are unpaid, valid and subsisting; *J. C. Shaw v. Maybill*, 90 N.W. 392; and on the sale of commercial paper that it is genuine; *Brown v. Ames*, 41 N.W. 448; so as to bonds, that they are valid

existing obligations; *Mezer v. Richards*, 163 U.S. 385; but see *Richardson v. Marshall County*, 100 Tenn. 346, where it was held that there was a warranty that bonds were genuine but not that the country issuing them had authority to do so.

⁵ Page on Contracts, 164.

⁶ (1813) 4 Taunt. 847, R. R. 14 688; cf. *Syers v. Jonas*, (1848) 2 Exch. 111.

⁷ See under 'Trade Usages.'

⁸ *Re Walkers and Shaw*, (1904) 2 K. B. p. 158.

A usage may be excluded by the express terms of the contract.¹ § 599.

The section and section 116 show that apart from usage there is no implied warranty of goodness or fitness save as provided by the Act. This is the English rule.² No warranty apart from Code.

The rule at Common Law was that on the sale of a specific chattel the seller is not responsible for defects, unless he fraudulently concealed or warranted against them.³

It has been held that on a sale of goods by a manufacturer of such goods, he not being otherwise a dealer in such goods, there is an implied warranty that the goods shall be those of the manufacturer's own make.⁴ On the same principle it has been held that an importing firm, accepting a commission to order out goods from England at a fixed rate, does not fulfil the contract by tendering goods obtained by them in Bombay, there being no usage to justify them.⁵ Sales by manufacturers.

The wording of the English section differs from that of the Indian. For an implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade. The Indian section refers to goodness or quality, but all trade usages are preserved by the Act; ⁶ any warranty may accordingly be annexed by usage. Conditions implied by usage.

As regards the sale of provisions the Code has introduced a principle not recognised at Common Law, it provides— § 600. Sale of provisions.

On the sale of provisions there is an implied warranty that they are sound. Sec. 111. Warranty of soundness implied on sale of provisions.

¹ *Yates v. Pym*, (1816) 6 Taunt. 445; *Smith v. Ludha Ghella*, 17 B. 129.

² *Bamfield v. Goole*, (1910) 2 K. B. 94, 104 C. A.

³ Leake on 'Contract' 5th Ed. 589.

⁴ *Johnson v. Raylton*, (1881) 7

Q.B.D. 438, 50 L.J.Q. B. 753; see *Starey v. Chilworth Gunpowder Co.*, (1889) 24 Q. B. D. 90.

⁵ *Bombay United Merchants Co. v. Doolubram*, (1887) 12 B. 50; *Beier v. Chotalal*, 30 B. 1.

⁶ Section 2.

§ 600.
Sale of pro-
visions.

This is a much wider provision than is to be found in English Common Law, (for the statement of Blackstone ¹ "in contracts for provisions it is always implied that they are wholesome" was not followed,²) or under the Act,³ or apparently in America where there is only an implied warranty if the provisions are sold directly to the consumer for domestic use or immediate consumption, and no warranty is implied if the sale is to a dealer or trader who buys to resell,⁴ or if the sale is not by a dealer although the seller may know the goods are bought for immediate consumption⁵; and the presumption when it arises is rebutted if it is shown that the buyer relied on his own skill and judgment.⁶

Meaning of
sound.

None of these exceptions are allowed under the Code; the warranty is in its widest form. Probably, as suggested by Sir F. Pollock,⁷ 'sound' means wholesome, and not in perfect condition or flavour. This conclusion is supported by the American cases which say that "the principle of implying such a warranty is not only salutary but necessary to the preservation of public health."⁸ Soundness apparently means that they must not, owing to their condition, or inherent qualities, or in consequence of the manner in which they have been treated, be at the time of sale unfit for consumption, or if to be used in making foodstuffs, be such as to cause such stuffs to be unfit for consumption.⁹ For apparently the section would include materials used in making food, such as baking powder.⁹

Materials
using in
making
provisions.

¹ Comm. III, 165.

² *Jones v. Just*, (1868) L. R. 3 Q. B. p. 202.

³ But unless the buyer relies on the seller's skill and judgment, s. 14 (1) is applied.

⁴ *Moses v. Mead*, (1845) 1 Denio. 387; 5 *ibid.* 617; *Howard v. Emerson*, (1872) 110 Mass. 320.

⁵ *Giroux v. Stedman*, (1888) 145 Mass. 439.

⁶ See Benj. 5th Ed. p. 656.

⁷ 2nd Ed. p. 423, and see Blackstone cited above.

⁸ Benj. 5th Ed. p. 656.

⁹ See Indian Penal Code, s. 273; cf. *James v. Jones*, (1894) 1 Q. B. 304 (where, however, baking powder was held not to be "an article of food"); *Bull v. Robison*, (1854) 24 L. J. Q. B. 165.

In the case of the sale of medicines it seems this section does not apply ; but if the buyer states the purpose for which he requires medicine, the case comes within section 114; but if he asks for a medicine under its patent name or for a particular well-known drug, the seller having no option but to supply it, under section 113 the seller warrants that it is the patent medicine ordered or is a drug commercially known by the denomination given by the buyer; but under section 115 he does not warrant its fitness for any particular purpose.

**§ 600.
Sale of
medicines.**

The warranty can be waived as where meat is sold with all faults.¹

Waiver.

Section 115 does not apparently in any way limit this section, unless patent foods under their patent names are purchased. If that section includes all goods of a well known ascertained kind, most foodstuffs would come within it.²

Section 115.

In America if food is sold for consumption there is an implied warranty that it is fit for human food. *Secus* if sold wholesale to a retailer.³

**American
law.**

There is no implied warranty on a sale of animals to a butcher or to a jobber,⁴ nor apparently is there in India.

In England the Courts have readily inferred that foodstuffs are impliedly bought for a particular purpose, that is to eat, and that there is therefore an implied condition that they are fit to eat.⁵

On a sale of goods by sample there is an implied warranty that the bulk is equal in quality to the sample.

**Section 112.
Warranty
of bulk
implied in
sale of
goods
by sample.**

There is a similar provision in the Sale of Goods Act,⁶ which provides for an implied condition in similar

¹ Cf. *Ward v. Hobbs*, (1878) 4 App. Cas. 13.

³ *Wudeman v. Keller*, 171, Ill. 93, 49 N. E. 210.

² See however *Cunningham & Sheperd*, Contract Act, 10th Ed. p. 829.

⁴ *Warren v. Buck*, 71 Vt. 44.

⁵ See under s. 114.

⁶ S. of G. Act s. 15 (2) (a).

§ 601.
Sales by
sample.

circumstances.¹ That Act defines a sale by sample as one in which there is an express or implied term to that effect, and in such a contract there is an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample, and that the goods shall be free from any defect rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.²

What
amounts to
sale by
sample.

The exhibition of a sample is generally considered equivalent to a warranty that the bulk of the goods shall answer the description of the small parcel exhibited.³ But it does not necessarily follow,⁴ and the presumption may be rebutted by an express inconsistent warranty.⁵

Usage.

Evidence of usage is admissible to show that a sale was by sample, though the written contract may be silent on the point⁶: but not parol evidence generally.⁶ Even inspection does not in England affect the condition.

Goods accepted on the report and samples given, were held subject to a warranty that they were equal to sample.⁷

¹ *Parker v. Palmer*, (1821) 4 B. & Ald. p. 391 (East India rice); *Syers v. Jonas*, (1848) 2 Exch. p. 117 (tobacco); *Carler v. Crick*, (1859) 26 L. J. Ex. 238 (seed barley); *Re Walker & Shaw* (1904), 2 K. B. 152 (barley about as per sample). The old view was that correspondence with the bulk was an implied warranty: Chalmers, 5th Ed. 41.

² See *Heilbutt v. Hickson*, (1872) L. R. 7 C. P. p. 456; *Modv v. Gregson*, (1868) L. R. 4 Ex. 49; *Drummond v. Van Ingen*, (1887) 12 Ap. Cas. 284; *Macfarlane v. Taylor*, (1868) L. R. 1 Sc. App. 245.

³ *Parker v. Palmer*, (1821) 4 B. & Ald. 387.

⁴ *Hill v. Smith*, (1812) 4 Taunt. p. 532; 10 R. R. 357; *Meyer v. Everth*, (1814) 4 Camp. 22, 15 R. R. 722; *McMullen v. Helberg*, (1879) 4 L. R. Ir. 94.

⁵ *Gardiner v. Gray*, (1815) 4 Camp. 144 16 R. R. 764; *Tye v. Cynmore*, (1813) 3 Camp. 462; *Meyer v. Everth*, (1814) 4 Camp. 22.

⁶ *Syers v. Jonas*, (1848) 2 Exch. 111; *Harnor v. Groves*, (1855) 24 L. J. C. P. p. 56; Evidence Act s. 92, proviso 5.

⁷ *Russell v. Nicolopulo*, (1860) 8 C. B. N. S. 362; cf. *Towerson v. Aspatia Agri. Society*, (1872) 27 L. T. 276 (warranty that bulk was fairly equal to analysis accompanying sample, when made).

There may be a sale where the sample is the only description so as to constitute the sole touchstone of the contract.¹ § 601.

Under the Common Law on a sale by sample there was no implied condition that the goods were merchantable,² though the facts and circumstances of the case might justify the inference that this condition is superadded by the contract.³ So a sample negated any implied condition of fitness or quality.⁴ No condition as to merchantable at Common Law.

But if the defect which rendered the goods unmerchantable was a latent one, that is a defect not discoverable by the ordinary reasonable examination of a prudent buyer,⁵ the ordinary presumption that the mere correspondence of the bulk with the sample satisfies the contract is negated, for the object of inspecting the sample or bulk is to give information, and if the sample is deceptive this object is defeated.⁶ But defects discoverable by the exercise of ordinary diligence in inspecting the sample, will not be a ground for rejection.⁷ But neither inspection of the bulk nor use of the sample absolutely excludes an enquiry whether the thing supplied was otherwise in accordance with the contract.⁸ Latent defects. Inspection.

In India although a sale is by sample, it may be inferred from the circumstances that there is an implied condition as to the quality of the article sold being of the

¹ *Mody v. Gregson*, (1868) L.R. 4 Ex. p. 53; *Carter v. Crick*, (1859) 28 L. J. Ex. 238.

² *Mody v. Gregson*, (1868) L.R. 4 Ex. p. 53; *Sayers v. London and Birmingham Flint Glass Co.*, (1858) 27 L. J. Ex. 294.

³ Benj. 5th Ed. 646; *Drummond v. Van Ingen*, (1887) 12 A. C. 284, 294.

⁴ *Mody v. Gregson*, (1868) L.R. Ex. 49, 53.

⁵ *Heilbutt v. Hickson*, (1872) L.R. 7 C. P. 438; see S. of G. Act s. 15.

⁶ *Drummond v. Van Ingen*, (1887) 12 A. C. p. 294 H. of L.; S. of G. Act s. 15 (2) (c).

⁷ *Drummond v. Van Ingen*, (1887) 12 App. Cas. p. 294, but for the rule in India, see under s. 113.

⁸ *Mody v. Gregson*, (1868) L.R. 4 Ex. p. 56.

§ 601. description given, and that too in the case of specific goods.¹ If the goods are specifically described in the contract,² they must answer to their description³ as well as correspond with the sample.⁴

Opportunity to inspect.

The buyer was entitled at Common Law to reasonable facilities for inspecting the bulk independently of any local or trade usage⁵; and if there was a latent defect in the sample, which if present in the bulk, would render the goods unmerchantable, the same is to be taken as free from it.⁶ The right to inspect may be varied by the express terms of the contract, but where by the contract an opportunity to inspect is not given until after payment, payment does not prejudice the right of rejection if the bulk does not correspond with the sample.⁶

Right varied by contract.

Place for comparing sample.

Primâ facie the place of delivery is the place for comparing the bulk with the sample.⁷ But this may be varied by the contract.⁸ Mr. Chalmers says the above is certainly the law in Scotland, but the question perhaps requires further consideration in England.⁹

Where defect latent.

If the defect is a latent one, the contract will be construed as if the place in which an effective inspection was first possible, were the place of inspection

¹ *Shoshi Mohun Pal v. Nobo Kristo*, (1878) 4 C. 801; see s. 113.

² *Drummond v. Van Ingen*, (1887), 12 A. C. p. 294 H. of L.; cf. S. of G. Act, s. 15 (2) (c).

³ *Heilbutt v. Hickson*, (1872) L. R. 7 C.P. 438; *Randall v. Newson*, (1877) 2 Q. B. D. p. 106; *Mody v. Gregson*, (1865) L.R. 4 Ex. p. 53; cf. *Wren v. Holt*, (1903) 1 K. B. 610 C. A.

⁴ *Azémar v. Casella*, (1886) L.R. 2 C. P. 431, 677; *Nichol v. Godtz*, (1854) 10 Exch. 191; see Con-

tract Act s. 113.

⁵ *Lorymer v. Smith*, (1822) 1 B. & C. L.; 1 L. J. (O.S.) K. B. 7; but see *Heyworth v. Hutchinson*, (1867) L. R. 2 Q.B. 447; *Polenghi v. Dried Milk Co.*, (1904) 10 Com. Cas. 42.

⁶ *Polenghi v. Dried Milk Co.*, (1904) 21 T.L.R. 118; see § 564.

⁷ *Perkins v. Bell*, (1893) 1 Q. B. 193 C. A., 62 L. J. Q. B. 91.

⁸ *Heilbutt v. Hickson*, (1872) L. R. 7 C. P. p. 456; *Grimoldby v. Wells*, (1875) L.R. 10 C. P. p. 395.

⁹ 5th Ed. p. 41.

mentioned in the contract,¹ even after acceptance on examination.² § 601.

A mistake in the sample exhibited may prevent the formation of a contract.³ For if the seller sues for non-acceptance the buyer may set up the fact that the bulk tendered is not the bulk from which the sample was taken. But, if the buyer who did not know of the mistake at the time of the contract, sues for non-delivery, the seller is estopped from setting up that he showed a wrong sample by mistake,⁴ on the principle that whatever a man's real intention may be, if he leads other to act owing to his conduct, he is bound thereby.⁵ Mistake in sample.

As to estoppel *see* cases in note.⁶

In America it was held that when samples were given it was expressly stipulated that the buyer must inspect for himself, there was no warranty against false packing, there being no fraud.⁷ But in India the buyer could reject in such a case under section 113 of the Contract Act.⁸ American rule.

Where an average sample was taken from numerous bales of brans, by taking samples from all the bales and mixing them, it was held that the buyer could not reject any bales as inferior to the sample, the true test being whether, if all the bales were mixed together, the quality Average sample.

¹ *Grimoldby v. Wells*, (1875) L. R. 6 Q. B. p. 607.
R. 10 C. P. p. 396.

² *Heilbutt v. Hickson*, (1872) L. R. 7 C. P. 438; 41 L. J. C. P. 228 (boots for the French army), but there the defect was concealed by fraud of the seller.

³ *Megaw v. Molloy*, (1878) 2 L.R. Ir. 530.

⁴ *Scott v. Littledale*, (1858) 27 L. J. Q. B. 201, 8 E. & B. 815; Benj. 5th Ed. p. 107.

⁵ *Freeman v. Cooke*, (1848) 2 Ex. 654; *Smith v. Hughes*, (1871)

⁶ 2 Sm. L.C. 11th Ed. 724; *Carr v. L. & N.W. Ry. Co.*, (1875) 10 C.P. 307; *Harris v. G. W. Ry.*, (1876) 1 Q. B. D. 530; *Burkinshaw v. Nicholls*, (1878) 3 A. C. 1004; *McKenzie v. British Linen Co.*, (1881) 6 A. C. 82; *Miles v. McIlwraith*, (1882) 8 A. C. 120 P. C.

⁷ *Barnard v. Kellogg*, (1870) 10 Wall. 383.

⁸ Cf. *Gau Kim Swee v. Ralli* (1886) 13 C. 287 P. C.

§ 601. of the bulk so formed corresponded to the sample.¹ Evidence was admitted in another American case that where a sample was drawn from some bags only, the custom was that the sample represented the average quality of the entire lot, not of each bag.²

Sec. 113.
Warranty
implied
where goods
are sold as
being of a
certain
denomina-
tion.

Where goods are sold as being of a certain denomination, there is an implied warranty that they are such goods as are commercially known by that denomination, although the buyer may have bought them by sample, or after inspection of the bulk.

Explanation.

But if the contract specifically states that the goods, though sold as of certain denomination, are not warranted to be of that denomination, there is no implied warranty.

Illustrations.

(a) *A*, at Calcutta, sells to *B* twelve bags of 'waste silk' then on its way from Moorshedabad to Calcutta. There is an implied warranty by *A*, that the silk shall be such as is known in the market under the denomination of 'waste silk.'

(b) *A* buys by sample and after having inspected the bulk, 100 bales of 'Fair Bengal' cotton. The cotton proves not to be such as is known in the market as 'Fair Bengal.' There is a breach of warranty.

§ 602.
Denom-
ination.

Compare Sale of Goods Act, ss. 13 and 14 (2).

The first illustration is founded on *Gardiner v. Gray*.³

The second illustration uses the term "warranty" in an instructive way. Clearly it means something totally different from the definition of a warranty in the

¹ *Leonard v. Fowler*, (1871) 44 N.Y. 289, cited in Benj., 5th Ed.

645.

² *Schnitzer v. Oriental Print*

Works, (1873) 114 Mass. 123.

³ (1815) 4 Camp. 144, 16 R.R.

764, approved in *Josling v. Kingsford*, (1868) 13 C. B. N. S. 447.

Sale of Goods Act. The goods were clearly not what were ordered, and there was a failure to perform the contract.¹

§ 602.
Sales as of a
a certain de-
nomination.

The section is very much narrower in its terms than section 13 of the Sale of Goods Act. But section 13 of the Sales of Goods Act does not deal with a condition properly so called,² but trenches on the general law as to non-compliance with the contract.³ As Pollock, C. B. expressed it,⁴ in a case where "foreign refined rape oil only warranted equal to sample" was sold, and rejected as not being what was commercially known under that description, "it is not exactly a warranty (which means condition in this passage); but if a man contracts to buy a thing he ought not to have something else delivered to him; for unless the seller shows that the goods tendered correspond to those bargained for, he has not launched his case⁵; and the buyer has no duty cast on him to examine.

Trenches on
rule as to
performance.

The specific goods may even in England be sold by description and the buyer has then the right to reject them if they do not conform with the description.⁶ For the property has not passed unless the description is correct.⁶ It has been held in England that sale of goods by description must apply to all cases where the purchaser has not seen the goods, but is relying on the description.⁶ If there has been inspection there is generally an absolute contract for the specific article.⁷

§ 603.
Sales by
description.

¹ Is it not a sale of specific bales?

² See *Bowes v. Shand*, (1877) 2 A. C. 480.

³ The Indian provision is in s. 39 Contract Act and is implied by s. 116.

⁴ *Nichol v. Godts*, (1854) 10 Ex. 191, 23 L. J. Ex. 314.

⁵ *Bowes v. Shand*, (1877) 2 A. C. 455 H. of L.; *Jackson v. Rotax Co.*, (1910) 2 K. B. 937 C. A.; and see as to sales by description § 603.

⁶ S. of G. Act, s. 13.; *Varley v. Whipp*, (1900) 1 Q. B. 518.

⁷ *Parsons v. Sexton*, (1847) 4 C. B. 899.

§ 603.
Where goods
are specific.

Sales by
description.

Chitty¹ says that if the subject matter be *in esse* and specific, the fact that the buyer has not inspected it does not necessarily show that he may not have agreed to take it such as it is. If the article is specific, it is either corporeally present in the sight of the buyer, or mentally identified by him. The question then arises does he buy simply what he sees or identifies, or does he buy only on the condition that it conforms to the description given. He may expressly so stipulate ; but in the absence of any express stipulation,¹ his intention must be gathered from the circumstances ; the general rule being that a contract for a specific article was a contract for that article as such.² The Common Law rule was that, if the circumstances showed that the description given to specific goods was essential to their identity as the subject matter of the contract, in other words that the buyer contracted for them as described, so that the falsity of description made the goods substantially different things from those that were described so as to constitute a failure of consideration, the sale was by description.³ But the parties might contract that any stipulation should be a condition which, if not complied with, would render the sale voidable.⁴

It was said in *Brailkwaite v. Foreign Hard Wood Co.*, that the buyer may reject goods after the property has passed, if they, in no respect, answer to the contract.⁵

But the English rule seems to depend on the doctrine that once the property has passed the goods cannot be

¹ 10th Ed. 420, citing *Chanter v. Hopkins*, (1838) 4 M. & W. 399; *Olivant v. Bayley*, (1843) 5 Q. B. 288.

² *Robertson v. Amazon Tug Co.*, (1881) 7 Q. B. D. p. 606 C. A.

³ *Kennedy v. Panama Mail Co.*, (1867) L. R. 2 Q. B. 580; *Lomi v. Tucker*, (1829) 4 C. & P. 15 (pictures as genuine old masters); cf. *Barr v. Gibson*, (1838) 3 M. &

W. 390.

⁴ *Head v. Tattersall*, (1871) L. R. 7 Ex. 7; *Gattorno v. Adams*, (1862) 12 C. B. N. S. 560; see *Calcutta Co. v. DeMattos*, (1862) 32 L. J. Q. B. 322; *Beer v. Walker*, (1877) 46 L. J. C. P. 677; *Bannerman v. White*, (1861) 10 C. B. N. S. 844.

⁵ *Per Matthew, L.J.*, (1905) 2 K. B. 543 C. A.

rejected : this does not apply in India.¹ But it is open to the parties to agree to buy a specific article as such without any description or condition,² and any term as to description may be only intended as a collateral agreement.¹

§ 603.

Sales as of a certain denomination.

The section therefore does not supply the buyer's only remedy, the goods may not be according to the contract under section 39.

And having regard to the wide construction placed on the terms for a particular purpose,³ there may be a remedy under section 114.

If the goods are commercially known by the denomination under which they are sold, the buyer must, apart from warranty express or implied, take the risk as to quality or condition.⁴

§ 604.
What is to be implied.

The section specially provides that the contract may specifically exclude any warranty. This of course must be so ; the parties may make what contract they please,⁵ but apt words must be used.⁶

So too a sample shown may be the only description given.⁷

The terms of the section are very wide, and it is apprehended that the warranty exists, although the buyer could have discovered the defects by inspection, and that there is no such qualification as in section 19 although a Calcutta case takes a contrary view⁸; but this conflicts with illustration (b). Cunningham and Shepherd⁹ argue

§ 605.
Not affected by unknown defects.

¹ See § 559.

² Section 113, Explanation.

³ See s. 114.

⁴ Sections 115, 116; *Barr v. Gibson*, (1838) 3 M. & W. 390 (stranded ship); *Wieler v. Schiltz*, (1856) 17 C. B. 619, 25 L. J. C. P. 89 (Calcutta linseed); cf. *Braithwaite v. Foreign Hard Wood Co.*, (1905) 2 K. B. p. 553; see § 522.

⁵ *Ward v. Hobbs*, (1878) 4 A. C. 13 (pigs sold with all faults).

⁶ See § 522.

⁷ *Mody v. Gregson*, (1868) L. R. 4 Ex. p. 53; *Carter v. Crick*, (1859) 28 L. J. Ex. 238.

⁸ *Shoshi Mohun Pal v. Nobo Kristo*, (1878) 4 C. 801.

⁹ 10th Ed. 331.

§ 605. that the section cannot cover defects which by ordinary care might have been discovered, or were in fact discovered.

Defects that
could be dis-
covered.

If a buyer, after discovering a breach of condition, does not avoid the contract, he waives the condition as such. But it seems doubtful if he is affected by any thing but knowledge.

The question¹ turns on whether section 19 or the principle of section 19 applies to conditions and warranties. It is quite clear that such a principle cannot be imported in the face of express words. And as there is a clear distinction between representations and warranties which was judicially recognised in India before the Contract Act was passed,² it seems obvious that the exception to section 19 was intended to have no application to the case of warranties. Section 113 is express ; it clearly refers to specific goods.³ The only method of giving a meaning to both sections is to construe them as suggested. The point would be too obvious for argument, had not a Calcutta bench applied section 19 to ascertained goods in respect of a warranty as to being commercially known by the denomination given in the contract.⁴ Reference was made to section 113, and the judgment then proceeded to overrule that section. But the whole judgment is, it seems, unsound. But if the buyer knew of the defect it will not be covered by a warranty or condition

¹ There was no such qualification at *C. L. : Tye v. Cynmore*, (1818) 3 Camp. 462.

² See *Turner Morrison & Co. v. Ralli Marrojam*, 2 B. L. R. O. C. 127, set out § 405. See *per* Sargent C. J. in *Oceanic S. N. Co. v. Sooderdas*, (1890) 15 B. p. 396 ; see Benj. 5th Ed. quoted in § 405.

³ Cunningham and Shepherd take the view that it applies to unascertained goods only, 10th

Ed. 329 ; but how could unascertained goods be inspected ? "Bulk" clearly means the whole and not a larger quantity from which the part bought is to be separate : see s. 112.

⁴ *Shoshi Mohum Pal v. Nobo Kristo*, (1878) 4 C. 801. The same view was taken in *Oceanic S. N. Co. v. Sooderdas*, (1890) 14 B. 241 ; but on appeal this was doubted : 15 B. 389, 396, 397.

however general.¹ But there must be clear evidence of knowledge.² § 605.

The Sale of Goods Act³ provides that there is an implied condition that goods sold by description shall correspond thereto; and ⁴ if bought from a dealer in such goods, the implied condition that the goods shall be of merchantable quality is subject to the proviso that if the goods have been examined there is no implied warranty as regards defects that such examination ought to have revealed, but it has been held they must nevertheless correspond to the description bargained for.⁵ English rule.

In India⁶ the rule, it seems, goes further than the Sale of Goods Act and implies a warranty in all cases from whomsoever purchased and irrespective of examination, that the goods shall not only correspond to the denomination but shall be what are commercially known by that denomination. Indian rule.

Even if the buyer is not protected against defects which he could have discovered, as an express warranty is likely to cause the purchaser to be more negligent,⁷ and the same reasoning applies to an implied warranty, this fact must be taken into consideration in considering what defects can be detected.⁸ Effect of warranty.

In a suit for the price of goods the seller must prove that he delivered or tendered goods answering to the Onus of proof.

¹ *Margelton v. Wright*, (1832) 7 Bing. 603, 8 Bing. 454; *Bayly v. Merrel*, (1815) Cro. Jac. 387, 679; see *Dyer v. Hargrave*, 10 Ves. p. 507.

² *Wilson v. Short*, 6 Ha. 364, 377; see *Price v. Macaulay*, 2 De G. M. & G. 346; *Dyer v. Hargrave*, 10 Ves. 505; *Colby v. Gadsden*, 15 W. R. 1185, reversing 84 Beav. 416.

³ Section 13.

⁴ Section 14 (2).

⁵ See *Wallis v. Russell*, (1902)

2 Ir. R. 585 C. A.; *Jones v. Just*, (1868) L. R. 3 Q. B. 197.

⁶ Section 113 and ss. 37, 51.

⁷ *Holliday v. Morgan*, (1858) 1 E. & E. p. 4; *Mowbray v. Merryweather*, (1895) 2 Q. B. 640.

⁸ *Holliday v. Morgan*, (1858) 1 E. & E. p. 4; *Tye v. Cynmore*, (1813) 8 Camp. 462; *Mowbray v. Merryweather*, (1895) 2 Q. B. 640 C. A.

§ 605. contract.¹ But in order to come within this section the goods must be contracted for as being of a particular denomination,² or the circumstances must show the existence of an implied description,³ *i.e.*, that the buyer relied on the description, and the contract if relating to specific goods, may imply no such condition.⁴

§ 606.
Commercially known by that denomination.

The phrase commercially known by that denomination apparently means the same as the rule laid down in *Jones v. Just*,⁴ that the goods must be merchantable under their description, or as it was put in an earlier case saleable in the market under the denomination mentioned in the contract.⁵ The goods must be of merchantable quality in fact ; the circumstance that the buyer obtained a sound price for them in re-sale will not prove them to be merchantable for the defect may be latent,⁶ and though under section 116 the seller is not responsible for latent defect if the goods answer the description given, this will not apply if the goods are unmerchantable, for that implies that they do not answer to their description.

Trifling defects easily remedied.

Furthermore it was held that 'merchantable' does not mean that the goods are merchantable if they only want some trifling thing done to make them immediately saleable, but it means something which is merchantable at the time when the tender is made by the seller.⁷ This conflicts with an earlier decision of the Court of Appeal not cited in the above case, where the contract being for a large number of goods and some not being according to contract, it was held, the defects being slight and easily remedied, that "as a lot the articles did not differ so

¹ *Jackson v. Rotax Co.*, (1910) 2 K. B. 937 C. A.; *Bowes v. Shand*, (1877) 2 A.C. 480.

² See *ante* § 603.

³ *Wren v. Holt*, (1908) 1 K. B. 610.

⁴ (1868) L.R. 3 Q.B. 197; 37 L. J. Q. B. 89.

⁵ *Gardiner v. Gray*, (1815) 4 Camp. 144.

⁶ *Wieler v. Schilizzi*, (1856) 17 C. B. 619, Benj. 5th Ed. p. 637.

⁷ *Jackson v. Rotax Co.*, (1910) 2 K. B. p. 943, 950 C.A.; *Tarling v. O'Riordan*, 2 L. R. Ir. 82.

as to entitle the buyer to reject.”¹ The distinction may turn on the rule *de minimis*,² but the two decisions seem hard to reconcile. And *Jackson v. Rolax Co.*³ is in accord with an earlier ruling, where the contract was for cotton to be delivered in merchantable condition, ‘the damaged if any, to be rejected, provided it cannot be made merchantable’ and it was held that at all events the bulk must be in merchantable condition when tendered and that it was not sufficient that it might be made merchantable.⁴ It seems on general principles that a party must tender goods in proper condition and apart from a possible opportunity to make a second tender is not entitled to further time beyond that allowed by the contract to make the goods conform to the contract.⁵

§ 606.

Easily made merchantable.

Merchantable quality applies to natural products and complicated machines.⁶

The term denomination probably means the same as the term description in the Sale of Goods Act and is not necessarily synonymous with kind or class.⁷ It is a sale by description in all cases where the buyer has not seen the article sold and relies on the description given him by the seller.⁷

§ 607
Denomination.

The Sale of Goods Act certainly draws no distinction between the nature of the goods sold and their other qualities, when it speaks of description in section 13, and there is no authority for such a distinction.⁸

¹ *Easterbrook v. Gibb*, (1887) 3 T. L. R. 401 C.A.; cf. *Braithwaite v. Foreign Hard Wood Co.*, (1905) 2 K. B. p. 553.

² See § 518.

³ (1910) 2 K.B. p. 943, 950 C.A.

⁴ *Morgan v. Gath*, (1865) 34 L. J. Ex. 165, 3 H. & C. 748, not cited in *Easterbrook v. Gibb* supra.

⁵ *Buddree Doss v. Rallt*, (1887) C. 678.

⁶ *Bristol Tramways v. Fiat Motor Co.*, (1910) 2 K. B. p. 840 C. A.

⁷ *Varley v. Whipp*, (1900) 1 Q. B. 513, 69 L. J. Q. B. 333.

⁸ *Wallis v. Pratt*, (1910) 103 L. T. R. p. 124 C.A., but see *Braithwaite v. Foreign Hard Wood Co.*, supra, and, as to damages, s. 53(2) and (3); and *Bostock v. Nicholson*, (1904) 1 K. B. 725.

§ 607. It would seem that under the section a sale of a ship would not cover the case of a stranded ship as was held in *Barr v. Gibson*,¹ for a ship almost hopelessly stranded would hardly be commercially of the denomination of a ship; "commercially" must mean more than merely of that denomination.

Sales of Skirving's swedes² and Calcutta linseed,³ are sales by description.

An immaterial variation from the description does not matter,⁴ apparently under the rule *de minimis*.⁵

For the distinction between sales by description and sales under a trade or patent name, see *Bristol Tramways Co. v. Fiat Motor Co.*⁶

§ 608.
Sales of
securities.

The cases of sales of securities where in England a condition that they are genuine has been implied would come under this section, though it is also under the contract itself⁷ that a seller of bills of exchange, notes, shares, certificates and other securities, is bound to deliver as a condition precedent genuine documents, and not false or counterfeit documents, or such as are not marketable under the denomination used in describing them.⁸ It is not sufficient to deliver a document of some value but not of the description given.⁹ Where a company sold a bill

¹ (1833) 3 M. & W. 390.

² *Allan v. Lake*, (1852) 18 Q. B. 560.

³ *Wieler v. Schilltzi*, (1856) 17 C. B. 619, 25 L. J. C. P. 89.

⁴ *Hopkins v. Hitchcock*, (1863) 32 L. J. C. P. 154; *secus* if it is material, *Powell v. Horton*, (1836) 2 Bing. N. C. 668.

⁵ *Jackson v. Rotax Co.*, (1910) 2 K. B. 937, 945 C. A.; *see* § 518, but *see* p. 464.

⁶ (1910) 2 K. B. p. 839 C. A. set not under s. 115.

⁷ *See Kennedy v. Panama Mail Co.*, (1867) L. R. 2 Q. B. p. 587

for principle.

⁸ For similar American law *see Meyer v. Richards*, (1895) 163 U. S. 385; *Jones v. Ryde*, (1814) 5 Taunt. 488 (forged navy bill); *Young v. Cole*, (1837) 3 Bing. N. C. 724 (repudiated bonds); *Gompertz v. Bartlett*, (1853) 23 L. J. Q. B. 65 (unstamped foreign bills of exchange); *Gurney v. Womersley*, (1854) 24 L. J. Q. B. 46 (forged acceptance).

⁹ *Gurney v. Womersley*, (1854) 24 L. J. Q. B. 46, but *see Sada Kavaur v. Tadeppally*, (1907) 80 M. 284, discussed in § 528.

of exchange to a bank representing that the company was liable thereon, whereas it was not, it was held that the bank could sue for money received by the company to the use of the bank.¹ The Court considered the case within section 18. Pollock² suggests the case was one of common mistake, under section 20, entitling the party who had paid the money to recover it under section 72. In England the ground for recovery of purchase money is as for a total failure of consideration and a breach of implied warranty of title³; but the terms of the contract may be subject to all faults or the like: such clauses have been considered above.⁴ But it has been held that in such cases the buyer can only recover any price paid and not damages for breach of a contract to deliver genuine shares,⁵ but in India section 75 covers the case. The rights of the buyer may be lost by laches.⁶

§ 608.
Sales of
securities.

If the buyer gets what he contracts for it is immaterial that it is valueless,⁷ and it has been held that a letter of allotment in a contract for shares, there being no shares, is, under a custom of the stock exchange,⁸ a good tender.

Where goods have been ordered for a specified purpose, for which goods of the denomination mentioned in the order are usually sold, there is an implied warranty by the seller that the goods supplied are fit for that purpose.

Section 114,
Warranty
where
goods
ordered
for a
specified
purpose.

Illustration.

B orders of *A*, a copper manufacturer, copper for sheathing a vessel. *A*, on this order, supplies copper.

There is an implied warranty that the copper is fit for sheathing a vessel.

¹ In *re Nursey Spinning Co.*, 8 C. B. 345.
(1880) 5 B. 92.

⁶ *Pooley v. Brown*, (1861) 31 L.
J. C. P. 134.

² Contract Act, 2nd Ed. 96.
³ *Raphael v. Burt*, (1884) Cab.
& E. 325.

⁷ *Lamert v. Heath*, (1846) 15
M. & W. 486.

⁴ § 522.

⁸ *Mitchell v. Newhall*, (1846)

⁵ *Westropp v. Solomon*, (1849) 15 M. & W. 308.

**§ 609.
Ordered for
a specified
purpose.**

The law in India seems to be wider than in England, for if goods are ordered for a specified purpose there is an implied warranty of fitness, provided the goods of the denomination mentioned are usually sold for such a purpose.

The corresponding English section¹ of the Sale of Goods Act implies a condition that the goods are reasonably fit for the purpose and has three provisos:—(1) The buyer must show that he relies on the seller's skill of judgment. (2) It must be the seller's business to supply such goods. (3) If the contract is for a specified article under its patent or trade name, there is no implied warranty.

**Seller's
business to
supply.**

This second proviso is clearly not the law in India. Whoever sells goods under such a contract is bound to supply such as are fit for the specified purpose. The third proviso depends on the construction of section 115.

**Rule as to
buyer relying
on his own
judgment.**

Under the Common Law a condition of fitness or quality was implied only so far as a buyer did not buy on his own judgment.² A distinction was made between cases where the buyer had an opportunity of examining the goods and those in which he had none.³ This was abrogated by the Contract Act and also by the Sale of Goods Act.⁴

**Specific
goods.**

The Common Law distinction between a purchase of specific as distinguished from ascertained goods has likewise been abrogated by both the English⁵ and the Indian Codes.⁶ The former Common Law presumption that if he inspected, the buyer relied on his own judgment, no longer holds in either country⁵: in England it is now a question of fact.⁵ The American law is that

¹ S. 14 (1).

² Benj. 5th Ed. 625.

³ *Jones v. Just*, (1865) L. R. 3 Q. B. 197, 37 L. J. Q. B. 89.

⁴ Chalmers, 5th Ed. 36.

⁵ *Wallis v. Russell*, (1902) 2 Ir. R. 585 C. A.

⁶ See, however, Pollock 2nd Ed. 428, where *Wallis v. Russell* is not cited.

the fundamental enquiry must always be whether under the circumstances in the particular case the buyer had the right to rely and necessarily relied on the judgment of the seller and not on his own.¹

§ 609.
Reliance on
seller's
judgment.

The illustration to the section is taken from *Jones v. Bright*² which was quoted by Miller J. in *Jones v. Just*³ as an authority for the proposition that the buyer must rely on the seller's judgment. It would seem then that the Legislature deliberately abrogated the Common Law rule. Sir F. Pollock⁴ is of opinion that the words "have been ordered" imply that the buyer relies on the seller's judgment. But this seems very strained. It might be argued that the Common Law rule was not abrogated, the Act not being exhaustive; but that cannot be deduced by assigning pregnant meanings to common words in the Act. But there is no fundamental principle according to which a seller should be excused the faithful performance of his undertaking because of the mental attitude of the buyer: if the seller desires to escape liability he can bargain accordingly, and thereby court more rigorous inspection: and semble the plain meaning of the words must be adopted, and it seems that if goods are ordered for the specified purpose that is a reliance on the seller's consequent responsibility to supply goods fit for that purpose, rather than a reliance on the seller's judgment; and there is no obvious ground for importing into the plain language of the code the Common Law rule.

The goods must be ordered for a specified purpose to create the implied warranty; merely mentioning the purpose when ordering goods of a well known ascertained kind, will be insufficient.

Ordered.

¹ *Kellogg Bridge Co. v. Hamilton*, (1883) 110 U. S. (3 Davis) 108, Story on Sales s. 366.

728, 7 L. J. (O. S.) C. P. 213.

³ (1868) L. R. 3 Q. B. 197.

² (1829) 5 Bing. 533, 30 R. R.

⁴ 2nd Ed. 428; no one else has suggested this.

§ 609. It would seem that the warranty arises, no matter what the article ordered may be ; and that section 115 does not limit section 114.

Communica-
tion of pur-
pose.

It does not seem necessary that the purpose should be actually stated if there is a fair inference that the goods were ordered for a particular purpose. Where a draper bought a hot water bottle from a chemist the Court said it might justly be inferred that the goods were bought and sold for the specific purpose of being used as a hot water bottle.¹ So on a sale of milk, the jury might reasonably infer that the milk was ordered for the purpose of being consumed.² It was held in Ireland by a Divisional Court that particular purpose under section 14 (1) Sale of Goods Act, was not so much particular purpose as distinct from general purpose, but it is a purpose stated to the seller as distinct from absence of purpose stated to the seller.³ Collins, M. R., said it means that in the particular case it was sold with reference to a particular purpose.⁴ Knowledge of the purpose may be imputed by reason of the character and name of the goods ordered.⁵ If the seller knows of a general purpose to which the goods may be applied, but not of the special purpose contemplated by the buyer, he fulfils his contract by supplying goods fit for the general purpose only.⁶ For where an article is capable of being applied to a variety of purposes, the buyer must, to raise an implication of a warranty of fitness, particularise the specific purpose which he has in view.⁷

Knowledge
of purpose.

¹ *Preist v. Last*, (1908) 2 K. B. 148.

² *Frost v. Aylesbury*, (1905) 1 K. B. p. 612.

³ *Wallis v. Russell*, (1902) 2 Ir. R. p. 596 (crabs for tea).

⁴ *Preist v. Last*, (1908) 2 K. B. 148 C. A.

⁵ *Drummond v. Van Ingen* (1887) 12 Ap. Ca. p. 293 ; *Jones v.*

Padgett ; (1890) 24 Q. B. D. 650, see *Bombay Burmah Co. v. Aga Mahomed*, (1911) 15 C. W. N. 981 P. C.

⁶ *Jones v. Padgett*, (1890) 24 Q. B. D. 650 C. A. (indigo blue cloth).

⁷ *Preist v. Last*, *supra*; *Drummond v. Van Ingen*, (1887) 12 A. C. p. 298 (H. of L.)

The purpose for which the goods were ordered need not be mentioned in the written contract, but may be proved *aliunde* if such evidence does not contradict the contract.¹ § 609. Parol evidence.

The purpose intended may be gathered from the circumstances of the case and from previous transactions between the parties,² the course pursued by the parties, and from their conduct and acts and writings antecedent to but leading up to the contract itself.³

Even where the sellers' agents are to pass the goods as arbitrators, still they must act honestly and impartially and apply their minds to consider whether the goods are fit for the purpose required.⁴

If the buyer suggests alterations in the mode of manufacture or the use of particular materials, he may nevertheless rely on the seller to supply goods fit for his purpose, though such suggestions cause the unfitness,⁵ but it is otherwise in England if the contract is for goods made in a particular way or according to plan or of specified materials,⁶ unless the contract is to produce goods fit for a particular purpose.⁷ But the reason given for this exception is that the buyer is relying on his own judgment, If the buyer suggests alterations, condition may subst.

¹ *Jacobs v. Scott*, (1899) 2 Fraser 70 (H. of L.)

² *Strongitharm v. North Lonsdale Iron Co.*, (1905) 21 T. L. R. 357 C. A.

³ *Gillespie v. Cheney*, (1896) 2 Q. B. 63 which was approved in *Crichton v. Love*, (1906) S. C. 818, where it was held that conversations might show the particular purpose. *Shepherd v. Pybus*, (1842) 3 M. & G. 68; *Jacobs v. Scott*, (1899) 2 Fraser (H. of L.) 70; contra, *Warren v. Keystone*, (1886) 65 Maryl 547 (American). The principle is that a collateral agree-

ment can be proved apart from the written contract, and the communication of the purpose raises a legal implication of a collateral term.

⁴ *Bombay Burmah Co. v. Aga Mahomed*, (1911) 15 C. W. N. 981 P. C.

⁵ *Hall v. Burke*, (1886) 3 T.L.R. 165 C. A.

⁶ *Hall v. Burke*, supra; *Cunningham v. Hall*, (1862) 86 Mass. 268 (ship ordered to be made of pine plank).

⁷ *Hydraulic Engineering Co. v. Spencer*, (1886) 2 T.L.R. 554 C.A.

§ 609. and this would not in India affect the case. For if the buyer, whatever his instructions are, orders goods for a particular purpose, the seller by implication of law undertakes that they shall be so fit, but he can of course protect himself by an express term.

Provisions
supplied.

This section covers the English cases of provisions supplied to a wholesale dealer, which although not actually unsound, nevertheless contain matter rendering the food unmarketable, as where whisky was supplied as ordered coloured to look like rum, but coloured with logwood which made it unsaleable and the sellers were held liable in damages.¹

Latent defect.

The illustration seems to be founded on *Jones v. Bright*,² where copper was ordered for sheathing a vessel, and carefully selected for that purpose by the seller: it however contained a defect unknown and unsuspected. The seller was held liable. A similar condition was implied on the sale of electric power where it was sold to drive a machine and its source was not indicated to the buyer.³

Electric
power.

Meaning of
'fit'.

The warranty implied is that the goods are fit for the purpose specified, and not reasonably fit as in the English Act, which has been construed to mean not merely that they can be used for the purpose, but are commercially suitable, and are not such that no prudent manufacturer or user would use for such a purpose.⁴ This seems to show that "reasonably fit" is wider than "fit." Generally such goods would also come within section 113 and unless commercially fit for the purpose required, would not be commercially known under this denomination.

¹ *Macfarlane v. Taylor*, (1868) L. R. 1 Sc. Ap. 245 (H. of L.)

² (1829) 5 Bing. 533.

³ *Bentley v. Metcalfe*, (1906) 2 K. B. p. 553. It seems that gas, water and electricity are goods in India: though this is doubtful in England, but they can be stolen:

Ferens v. O'Brien, (1888) 11 Q. B. D. 21; and see *County of Durham E. P. Co. v. Inland Revenue*, (1909) 2 K. B. p. 609.

⁴ *Strongitharm v. North Lonsdale Iron Co.*, (1905) 21 T. L. R. 357 C. A. (lime for iron works).

Fit seems to mean commercially fit and not merely that they could be used for the purpose, and the purpose may be a commercial purpose. The seller's liability to supply goods that are "fit" is an absolute one. Consequently he is not discharged by reason that the defects in the goods are latent ones. This was also the Common Law rule¹ and is the present English rule.²

§ 609.
Latent defects.

A buyer may recover damages for a latent defect although he has resold the goods,³ or used a great part of them.⁴ Where the defendants sold molasses and casks for the same, the price to include cooperage, and agreed to ship the same in three days, it was held that they warranted that the casks should be sufficiently and properly coopered for any reasonable voyage from Calcutta.⁵ But generally an implied condition does not extend to the package or receptacle in which goods are contained,⁶ but where disinfectant was sold in a tin, the view taken was that there was an implied condition that the tin was reasonably fit to be opened safely.⁷

Packages.

Where mortar was sold for some building operations, and subsequently the building was condemned by the local authorities on the ground that the mortar was bad, the seller was made to pay the cost of pulling down and rebuilding.⁸ Where an orchid was sold at auction as a white variety for £20, and after two years flowered purple, it was found that if white it would have been worth £50 at the time of the sale, and damages were given for £50.⁹ So where poisonous sugar was sold to brewers for

Damages.

¹ *Randall v. Newson*, (1877) 2 Q. B. D. 102 C. A. Hyde 123.

² *Frost v. Aylesbury Dairy Co.*, (1905), 1 K. B. 608 C. A. ; *Wallis v. Russell*, (1902) 2 Ir. R. 585 C. A.

³ *Wieler v. Sahilizzi*, (1856) 17 C. B. 619, 25 L. J. C. P. 89.

⁴ *Josling v. Kingsford*, (1863) 13 C. B. N. S. 447, 32 L. J. C. P. 94.

⁵ *Palmer v. Cohen*, (1868) 1

⁶ *Gower v. Van Dedalzen*, (1887) 3 Bing. N. C. 717 ; *Ormrod v. Huth*, (1845) 14 M. & W. 651.

⁷ *Clarke v. Army and Navy Co-op. Soc.*, (1903) 1 K. B. 155 C. A.

⁸ *Smith v. Johnson*, (1899) 15 T. L. R. 179.

⁹ *Ashworth v. Wells*, (1898) 78 L. T. 186, 14 T. L. R. 227 C. A.

**§ 609.
Damages.**

brewing, the seller had to pay the cost of advertising that the materials for brewing had been changed, (that being a reasonable step to protect the plaintiff's business), and the loss caused to the plaintiffs by destroying the bad beer.¹ The seller of the sugar then sued the persons from whom they bought poisonous sulphuric acid to prepare the sugar for brewing ; it appeared that they might have discovered the defect by the exercise of ordinary care. They recovered the price paid for the acid, the value of goods spoilt by being mixed with it, but not damages for injury to their business reputation, or damages for which they became liable to the brewers, as not directly and naturally arising from the breach of warranty.² In America if animals are sold for breeding, there is no warranty that they are fit. But the contract if the defect was known to the seller, is void for fraud.³ So the sale of animals known to be diseased was held to be a fraud, and the vendor was held liable for consequent loss of vendee's other stock.⁴

**Section 115.
Warranty
on sale of
article of
well-known
ascertained
kind.**

Upon the sale of an article of a well-known ascertained kind, there is no implied warranty of its fitness for any particular purpose.

Illustration.

B, writes to *A*, the owner of a patent invention for cleaning cotton :—"Send me your patent cleaning machine to clean the cotton at my factory." *A* sends the machine according to order. There is an implied warranty by *A* that it is the article known as *A*'s patent cotton cleaning machine, but

¹ *Halden v. Bostock*, (1902) 18 T. L. R. 317.

² *Bostock v. Nicholson*, (1904) 1 K. B. 725, 73 L. J. K. B. 524, 9 Com. Cas. 200.

³ *McQuaud v. Ross*, 55 N. Y. 705. Where a bull known to the

seller to be impotent was sold for breeding purposes, the seller was held liable for loss of milk because the buyer's cows were not with calf ; *Maynard v. M.*, 49 Vt. 297.

⁴ *Grosby v. Stapleton*, 94 Mc. 423.

none that it is fit for the particular purpose of cleaning the cotton at *B's* factory.

The distinction between the principle of this section and of section 114 is well-known in England and has been stated to be that if a man orders in express terms an article known by a patent or trade name under that name, and gets it, he cannot complain that it will not answer some specific purpose for which he wanted it, even although he told the vendor before he ordered it the purpose for which he required it.¹ The buyer may make an express condition if he desires that the article should answer the purpose, but the seller is not bound to refrain from carrying out his order for a machine because it is ill adapted for or wholly incapable of effecting the purpose mentioned in the order. But this must be confined to articles which have in fact a patent or trade name under which they can be ordered.² It is one thing to order a Fiat omnibus ; an order which is only intelligible if there be such an article known to the public or the trade ; it is quite another thing to order an omnibus to be made by the Fiat company, although in the latter case the company might have adopted patterns and devices which were its own exclusive property : the former is within the proviso, the latter is not. An omnibus made by the Fiat company may well be described as a Fiat omnibus, but such nomenclature does not necessarily constitute a trade name ; if it did, a manufacturer could always get the benefit of the proviso by labelling all the goods made by him with his own name. A trade name must be acquired by user, and it is a question of fact if it has been so acquired.³

§ 610.
Principle.

Goods of
well-known
ascertained
kind.

The illustration does not imply that *A* knew what sort of cotton *B* proposed to clean. Had *B* particularised

¹ Secus if ordered for that purpose.

² *Bristol Tramways v. Fiat Motor Co.*, (1910) 2 K. B. p. 839 C. A.

§ 610. his special brand of cotton, the contract might be differently construed.¹

Illustration. The illustration is apparently founded in *Chanter v. Hopkins*,¹ where a brewer ordered "your patent hopper and apparatus to fit up my brewing copper with your smoke consuming furnace." The thing proved a failure, but the buyer was made to pay for it.

Sales of goods of well-known ascertained kind. There seems to be a consensus of opinion among text writers that this section and the proviso to section 14 (1) of the Sale of Goods Act are substantially to the same effect.² It seems, however, that it is not by way of a proviso to section 114; it does not appear to be so from its position in the Act; and the reasonable construction of the two sections would be to treat section 115 as a general rule and section 114 as an exception, though not drafted as such because it covers wider ground.

The reason for the exception to section 14 (1) of the Sale of Goods Act is that if the buyer defines the specific article or class of goods he requires to fulfil his purpose, he buys on his own judgment, and although he communicates to the seller the particular purpose for which he wants the goods, he must take the risk of their adaptability, for the seller has no option to supply anything else.

Unascertained.

It is not necessary that the thing ordered should be a specific thing, *i.e.*, identified and agreed upon at the time of the contract; it is sufficient if it be an unascertained article of a definite kind, a "specified article." The proviso to section 14 (1) has been held to be intended to meet the case not of the supply of raw commodities or materials, but of manufactured articles such as steam

¹ *Chanter v. Hopkins*, (1838) 4 M. & W. 399; cf. *Paul v. Corporation of Glasgow*, (1900) 3 Fraser 119; *Ollivant v. Bayley*, (1843) 5 Q.B. 288, 13 L. J. Q. B. 34; *Prideaux v. Bunnell*, (1857) 1 C.B.N. S. 613 (an attempt to fix every

patentee with a warranty); *Mallan v. Radloff*, (1864) 17 C.B.N.S. 588 (soap frames warranted perfect).

² Pollock, 2nd Ed. 429; Chalmers, 5th Ed. 34; Cunningham & Shepherd, 10th Ed. 334.

ploughs or any form of invention which has a known name and is bought and sold under its known name patented or otherwise.¹ There may, however, be an express engagement of a seller to supply a patent article fit for the buyer's purpose.² § 610.

In the absence of fraud and of any express warranty of quality, the seller of an article which answers the description under which it was sold, is not responsible for a latent defect in it. **Section 116. Seller when not responsible for latent defect.**

Illustration.

A sells *B* a horse. It turns out that the horse had, at the time of the sale, a defect of which *A* was unaware. *A* is not responsible for this.

This section is a restricted application of the old Common Law principle of *caveat emptor*. Apparently the section is based on *Parkinson v. Lee*.³ § 611. Latent defect.

The meaning of latent seems under the English sale as stated in *Redhead v. M. Ry.*⁴

The article must exist,⁵ but may be valueless.

The illustration suggests that the seller must be unaware of the defect; but illustration (a) to section 17 shows that this is not so. And in a sale by auction, unless steps have been taken to conceal the defect, there is no fraud.⁶ Seller need not be unaware of the defect.

There is no corresponding section in the Sale of Goods Act. The section does not in any way effect the implied warranties in the foregoing sections. The English condition of description and the American warranty of

¹ *Gillespie v. Cheney*, (1896) 2 Q.B. 59, 64; 12 T.L.R. 274.

² *Chantler v. Hopkins*, (1888) 4 M. & W. p. 405; *Hydraulic Engineering Co. v. Spencer*, (1886) 2 T.L.R. 554 C.A.

³ (1802) 2 East. 814; 6 R.R. 429, criticised in *Jones v. Bright*, (1829) 5 Bing. 588; said to be overruled in *Randall v. Newson*, (1877) 2 Q. B. D. p. 106 C. A.; see however

Mody v. Gregson, (1868) L. R. 4 Ed. 49; *Barr v. Gibson*, (1888) 8 M. & W. 397.

⁴ L. R. 2 Q. B. 412, 4 Q. B. 379.

⁵ Contract Act, s. 20.

⁶ *Schneider v. Heath*, (1813) 8 Camp. 506; *Ward v. Hobbs*, (1877) 3 Q. B. D. p. 162, (1878) 4 A. C. 18; *Baglehole v. Walters*, (1811) 3 Camp. 154, 18 R. R. 778.

§ 111. identity are subject to the single principle that the seller shall deliver what he contracted to sell.¹

Does not
affect section
118 or 114.

The defect may be such as to prevent the article delivered from coming under the denomination of the description in commercial language. Where there is not a question of warranty but a failure to deliver the goods bargained for,² the fact that the defect in the goods tendered was latent does not make such tender a compliance with the contract. Nor does it affect the seller's liability on an implied condition of fitness.³

Latent
defects.

In England⁴ a general express warranty does not usually extend to defects apparent on simple inspection, requiring no skill to discover them, nor to defects known to the buyer. But the warranty may be so expressed as to protect the buyer against consequences growing out of patent defects.⁵

Express
warranty.

But if there is an express warranty it is material to determine if the defect was so patent that the buyer was bound to notice it, as he might naturally exercise less vigilance where he had a warranty to rely on.⁶ Further⁴ an inspection directed to one point will not be considered as an inspection on other points.⁷

Section 117.
Buyer's
right on
breach of
warranty.

Where a specific article, sold with a warranty, has been delivered and accepted, and the warranty is broken, the sale is not thereby rendered voidable, but the buyer is entitled to compensation from the seller for loss caused by the breach of warranty.

¹ *Meyer v. Richards*, (1895) 163 U. S. 385.

² *Josling v. Kingsford* (1863) 13 C. B. N. S. 447, 32 L. J. C. P. 94.

³ *Randall v. Newson*, (1877) 2 Q. B. D. 102; *Frost v. Aylesbury Dairy Co.*, (1905) 1 K. B. 608.

⁴ Benj. 5th Ed., 665.

⁵ *Liddard v. Kain*, (1824) 2 Bing. 183; *Margetson v. Wright*,

(1832) 7 Bing. 603, 8 Bing. 454; *Bayly v. Merrel*, (1615) Cro. Jac. 387; *Butterfield v. Burroughs*, (1706) 1 Salk. 211.

⁶ *Mowbray v. Merryweather*, (1895) 2 Q. B. 640 C. A.; *Tye v. Cymore*, (1813) 8 Camp. 462.

⁷ *Cowdy v. Thomas*, (1877) 38 L. T. N. S. 22.

Illustration.

A sells and delivers to *B* a horse warranted sound. The horse proves to have been unsound at the time of sale. The sale is not thereby rendered voidable, but *B* is entitled to compensation from *A* for loss caused by the unsoundness.

The effect of this section has been discussed in paragraph 559. The illustration is based on *Street v. Blay*,¹ which is no longer law in England.²

§ 612.
Rights on
breach of
condition
as to speci-
fic goods.

Doubtless the parties can make what contract they please, but the section displaces the usual English presumption that a stipulation in the case of a specified article in which the property has passed does not go to the root of the contract. And in England the old rule drawing a distinction between sales of specific goods and unascertained goods³ has been almost abrogated by *Varly v. Whipp*.⁴

It is convenient to discuss next the question of acceptance; the buyer's duty to accept depends on the sufficiency of the seller's offer to deliver.

The question of acceptance is only material where there is a right to reject. In England the order and selection of specific goods by a buyer, having an opportunity to inspect them, is conclusive of acceptance⁵ and even if there is no opportunity to inspect if the contract is to take identified goods absolutely there is no further question of acceptance.⁶ Ordinarily if the property in the goods has

§ 613.
Acceptance
in England.

¹ (1831), 2 B. & Ad. 456, 36 R.R. 626.

² *Heilbutt v. Hickson*, (1872) L. R. 7 C. P. p. 449.

³ *Heyworth v. Hutchinson*, (1867) L. R. 2 Q. B. 447, 451.

⁴ (1900) 1 Q. B. 513.

⁵ See *Cusack v. Robinson*,

(1861) 1 B. & S. 299; *Castle v. Swarder*, (1861) 6 H. & N. 828; *Kershaw v. Ogden*, (1865) 3 H. & C. 717; but these were cases under the statute of frauds, see § 616.

⁶ See *Pettitt v. Mitchell*, (1842) 4 M. & G. 819, but see now S. of G. Act s. 34 (1).

§ 613. passed, the question of acceptance does not arise.¹ But whether the goods were originally specific or the property passes by election, the buyer may by the contract have the right to subsequently reject the goods under a condition subsequent express or implied from the circumstances.²

English
right of re-
jection
where
property
passed.

Right to
reject.

Under the English Law in some cases the buyer may reject goods in which the property has passed, as where goods have to be despatched by a carrier and their condition may (though not necessarily) be affected by the duration of the transit. It may, therefore, be presumed that the parties have in the circumstances agreed that the property shall pass on the despatch of the goods if they then are according to the contract, so as to cast upon the buyer the usual risks of ownership, but that the buyer shall have the right to rejecting the goods if on their arrival they are unmerchantable.³ There is also the case of entire quantities deliverable by instalments, when the buyer may in certain cases reject previous deliveries if the entire quantity is not sent.⁴

§ 614.
Indian rule
as to ac-
ceptance of
specific
goods.

In India in the case of specific goods, section 117 enacts a rule which is somewhat obscure,⁵ for the right to reject is only lost after delivery⁶ and acceptance; this appears to modify the English rule, and the passing of the property, it seems, does not involve acceptance,⁷ but the buyer has a right on delivery,⁸ to elect to reject goods which do not

¹ Benj. 5th Ed. 748, citing *Nichols v. Morse*, (1868) 100 Mass. 528.

² *Couston v. Chapman*, (1872) L.R. 2 Sc. Ap. p. 254; L.R. 2 H.L. 250; *Lamond v. Davall*, (1847) 9 Q. B. 1030; *Head v. Tattersall*, (1871) L.R. 7 Ex. 7.

³ *Per* Blackburn, L. J., *Calcutta Co. v. De Mattos*, (1862) 32 L.J.Q.B. 322; *Beer v. Walker*, (1877) 46

L.J.C.P. 677.

⁴ *See* § 583.

⁵ Section 38 also gives a right of inspection after delivery and is not confined to unascertained goods.

⁶ A word of varied meaning, but apparently used to signify actual receipt.

⁷ *See* § 559.

⁸ *Cf.* the Scotch rule S. of G. Act s. 11 (2).

correspond with the conditions of description or quality contained in the contract. § 614.

It seems that this right is not lost by any acceptance implied from the sale of specific goods, nor is it affected by any examination previous to delivery. This is also deducible from section 38 which applies to all contracts, and gives a right of inspection on tender. In the same way section 113, which undoubtedly refers to specific goods,¹ makes the warranty which under section 117 gives a right of rejection, independent of and unaffected by previous inspection.²

Right unaffected by any implied acceptance or previous inspection.

The position approximates to that in England where though the property has passed, the buyer may reject under a special term for failure of any condition.

The term delivery it seems includes constructive delivery and there the buyer may be bound to accept goods without inspection, but only if he has waived that right by acceptance.

Constructive delivery.

If the seller has a right of election, and duly follows its terms and appropriates goods according to the contract, the buyer has no option to reject them. But if the seller has not duly followed the terms of the authority to appropriate and the goods do not conform to the description in the contract or any condition, express or implied, of quality is broken, the property will not pass, and the buyer has the right to reject the goods³ unless he waives the right. In such a case the risk remains with the seller, and it seems that the buyer will only be deemed to have accepted the goods if he has waived his right to inspection as by intentionally taking the chance of the

§ 615.
Where there is a right of election.

¹ See under that section.

² See *Mitchell Reid v. Buldeo Dass*, (1887) 15 C. I., where although the property had passed in specific bales, it was held that the buyer had a right to see that the goods were of contract qua-

lity before he was bound to accept: but the Court considered that the property had in consequence of this right not passed, which seems unsound.

³ *Vigers v. Sanderson*, (1901) 1 K.B. 608.

goods corresponding to the contract,¹ or has elected after an opportunity to inspect to accept them.¹

**§ 616.
Duty of
buyer to
accept.**

It must be noted that in India the question of acceptance arises chiefly in respect of section 117, and that the sections of the Statute of Frauds relating to sales of goods have been repealed.² All English cases turning on the Statute of Frauds or section 4 of the Sale of Goods Act must be read with caution, as acceptance thereunder is distinct from acceptance in performance of the contract. Acceptance is not necessary for the passing of the property, but if the goods are such that they may be properly rejected no property has passed until the buyer expressly or impliedly accepts them.³

The buyer, when the seller has done or tendered all that his contract requires, must in the absence of express stipulations to the contrary,⁴ accept and pay for the goods.

**§ 617.
Buyer must
fetch the
goods.**

The buyer must fetch the goods, unless otherwise agreed, for *primâ facie* all that the seller has to show is that he was ready and willing to deliver possession on payment of the price.⁵ If the buyer make default in fetching away the goods within a reasonable time after the sale, after request made by the seller, he will be liable for warehouse rent and other expenses reasonably incurred owing to custody of the goods, or to an action for damages if the seller is prejudiced by the delay.⁶ But in England if the contract is to deliver as required, it is no defence to an action for non-delivery by the buyer, that he did not

¹ See *Wallis v. Pratt*, (1910) 108 L.T.R. 122, reversed by the H. of L. (1911) A.C. 394.

² Contract Act, Repeals.

³ See *Perkins v. Bell*, (1893) 1 Q.B. 193 C.A.; *per* Lord Hatherley in *Anderson v. Morice*, (1876) 1 App. Cas. p. 730; but see *ibid.* pp. 727, 733.

⁴ *Ramdeo v. Cassim Mamoojee*,

(1898) 21 C. 173 C.A.

⁵ *Cort v. Ambergate Ry. Co.*, 17 Q.B. 127; 20 L.J. Q.B. 460; *Baker v. Firminger*, (1859) 28 L. J. Ex. 130.

⁶ *Greaves v. Ashlin*, (1813) 8 Camp. 426; *Bloxam v. Sanders*, (1825) 4 B. & C. 941; *Bartholomew v. Freeman*, (1878) 3 C.P.D. 316, and for other rights, see § 494.

request delivery within a reasonable time. The seller to get rid of his obligations in the case of unreasonable delay in taking the goods, or in requiring delivery, must offer delivery or inquire whether the buyer intends to take the goods. He cannot treat the contract as rescinded by mere delay, unless the contract makes time the essence of the contract.¹ This principle would, it seems, apply in India, for although a demand for delivery is a condition precedent to a right to sue for non-delivery under section 93 unless there is an agreement to the contrary, still in the absence of a demand within a reasonable time or within the time fixed by the contract, the seller *prima facie* cannot where the property has passed thereupon repudiate the contract.

§ 617.
Delay in
demanding
delivery.

The English Act provides in section 34 that where goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract. This was the Common Law.²

§ 618.
Right of
inspection.

The presumption in section 34 of the Sale of Goods Act is based on common sense, and follows the Common Law and will therefore arise in India.

The Indian³ rule differs from the English in as much as a tender is invalid unless the buyer has a reasonable opportunity of examination, whereas the English⁴ rule is that the seller is bound on request to afford the buyer a reasonable opportunity, which was the Common Law.⁵ At Common Law the buyer had an implied right to

Differs from
English rule.

¹ *Jones v. Gibbons*, (1853) 8 Ex. 920.

Heilbutt v. Hickson, (1872) L. R. 7 C. P. p. 458.

² *Lorymer v. Smith*, (1822) 1 B. & C. 1; *Toulmin v. Hedley*, (1845) 2 C. & K. p. 160; *Hunt v. Hecht*, (1853) 8 Ex. 814, 817;

³ Contract Act, s. 38.

⁴ S. of G. Act, s. 34.

⁵ Benj. 5th Ed. 740.

§ 618.
Right of
inspection.

inspect goods purchased before accepting them.¹ He cannot be compelled to accept goods tendered out of business hours² nor to select goods out of a tender of a quantity larger than that contracted for, if section 119 applies. If the buyer is refused reasonable inspection he is justified in repudiating the contract³ unless it is otherwise agreed.⁴ If the seller refuse to allow the buyer to compare the bulk with the sample by which it was sold, when the demand is made at a proper and convenient time, the buyer need not comply with the contract at all.⁵ Where the buyer contracted to purchase two parcels of wheat by sample, and the seller refused inspection of one parcel, and the buyer declined to take any of the wheat, though the seller afterwards said that he might inspect both parcels, but the buyer declined, the buyer obtained a verdict. The Court held that he had the right to inspect by usage; "which is so reasonable that without any such usage the law would give him the right."⁶ In *Isherwood v. Whitmore*,⁷ it was held that a tender of goods in closed casks which the seller refused to have opened was bad.⁸ This was so in England even on a sale of specific goods, where the property had not passed⁹. In short, the buyer's duty to accept depends altogether on the sufficiency of the tender.⁹

Closed
packages.

¹ *Biddell v. Clemens*, (1911) 1 K. B. 934 C. A.; *Chalmers v. Paterson*, (1897) 84 Sc. L. R. 768; Benj. 5th Ed. p. 1004 n. 7.

² Contract Act, s. 38.

³ *Biddell v. Clemens*, (1911) 1 K. B. 934; *Toulmin v. Hedley*, (1845) 2 C. & K. 157.

⁴ *Pettitt v. Mitchell*, (1842) 4 M. & G. 819.

⁵ *Castle v. Swooner*, (1861) 29 L. J. Ex. p. 238; 30 L. J. Ex. p. 312; *Ruttonsey Morarji v. Jamnadas*, (1882) 6 B. 692.

⁶ *Lorymer v. Smith*, (1822) 1 B. & C. 1.; cf. *Howe v. Palmer*, (1820) 3 B. & Ald. 321.

⁷ 10 M. & W. 757, (1843) 11 M. & W. 347, 550; 12 L. J. Ex. 319.

⁸ See *Toulmin v. Hedley*, (1845) 2 Car. & Ker. 157, 160; *Startup v. Macdonald*, (1845) 6 M. & Gr. p. 610.

⁹ *Makin v. London Rice Mills*, (1869) 20 L. T. N. S. 705 (double bags).

In the case of a sale by auction goods with all faults however, the Court held that the conditions of sale were inconsistent with such a right before payment and put their judgment on the broad ground of the inconvenience of implying such a condition. But it was held that after payment, but before taking the goods away, the seller had the right to measure them.¹

§ 618.

Right of inspection.

But the right to inspect may be waived.² If the buyer, where goods are to be delivered at a particular place, on such delivery sends them elsewhere and tenders them to a sub-buyer, he has thereby waived inspection and accepted the goods.³ For inspection is waived if the buyer without inspection either takes possession of the goods or exercises proprietary rights over them,⁴ or, in fact, if he does anything amounting to acceptance without insisting on his right thereto,⁵ for he thereby knowingly takes his chance of the goods being of the contract quality.⁶ But anything which has to be done under the contract before inspection is not a waiver thereof, such a prepayment of the price,⁷ nor is anything authorised by the contract expressly or impliedly, as sending on to sub-buyers goods bought packed for a foreign voyage, as the sellers knew that they were to be sent on and that the first buyer would not unpack them before so doing.⁸

§ 619.

Right to inspect may be waived.

Primâ facie the place of delivery is the place for inspection,⁹ but the contract may expressly or impliedly

§ 620.

Place for inspection.

¹ *Pettitt v. Mitchell*, (1842) 4 M. & Gr. 819, 12 L. J. C. P. 9.

² *Castle v. Swarder*, (1861) 30 L. J. Ex. p. 312; *Khan v. Duché*, (1905) 10 Com. Cas. 87; *Polenghi v. Dried Milk Co.*, (1905) 10 Com. Cas. 42.

³ *Perkins v. Bell*, (1893) 1 Q. B. 193 C.A.; *Haridas Khandelwal v. Kalumull*, (1903) 30 C. 649.

⁴ *Clive Jute Mills v. Ebrahim Arab*, (1896) 24 C. 177.

⁵ For resales before an opportunity to inspect, see § 624.

⁶ *Wallis v. Pratt*, (1910) 103 L. T. R. 122, reversed on other points, (1911) A. C. 394.

⁷ *Pierson v. Crooks*, (1889) 115 N. Y. 539, see § 564.

⁸ *Molling v. Dean*, (1902) 18 T. L. R. 217.

⁹ *Perkins v. Bell*, (1893) 1 Q. B. 193 C. A.; 62 L. J. Q. B. 91.

§ 620. provide for a different place or that the inspection shall be subsequent to delivery.¹

Latent defect.

Where the defect is a latent one not discernible at the place of delivery or inspection, the contract, if the first inspection was rendered inefficacious by acts for which the seller is responsible, will be construed as if the place in which an effective inspection was first possible, was the place of inspection mentioned in the contract.¹

Where no opportunity to inspect at place of delivery.

If there is no opportunity for reasonable inspection at the place of delivery, on subsequent examination the buyer may reject. The principle is that the seller's consent to the inspection being at the first place where it is reasonably practicable may be reasonably presumed.²

Where goods are shipped.

Primâ facie where a seller delivers goods to a carrier to be forwarded to a distant buyer, the right of inspection continues till the goods are accepted at their ultimate destination, and previous payment of the price under the contract is not a waiver of the right to inspect.³

Goods sent packed for delivery abroad.

If goods are to the knowledge of the seller sold and delivered packed to be sent unopened to a sub-purchaser in a distant country, that country is meant to be the place for inspection, and the buyer may reject them if not of contract quality and charge the seller with the cost of carriage to and from ⁴ such country.⁵

¹ *Grimoldby v. Wells*, (1875) L. R. 10 C. P. p. 396; *Heilbutt v. Hickson*, (1872) L. R. 7 C. P. p. 456.

² *Grimoldby v. Wells*, (1875) L. R. 10 C. P. p. 396; *Perkins v. Bell*, (1898) 1 Q. B. 198 C. A.

³ See under waiver of conditions precedent, para. 564; *Pier-son v. Crooks*, (1889) 115 N. Y. 539; *Molling v. Dean*, (1902) 18 T. L. R. 217.

⁴ Generally the buyer's duty is to give notice of rejection and the goods are then at the

seller's risk: the seller is liable for all expenses and for the cost of keeping the goods. This also is generally the extent of the buyer's right. But in the case cited, the sub-buyers gave notice to the buyers of rejection and the buyers were compelled to take the goods back. As this was the natural and probable result of the seller's breach of contract, he was chargeable with the expenses incurred.

⁵ *Molling v. Dean*, (1901) 18 T. L. R. 217 Dev.

Under section 38 (3) of the Contract Act¹ a tender is not valid without giving a reasonable² time for examination. **§ 620.**

Long and unreasonable delay after receipt is stringent proof of acceptance ; while a shorter time merely constitutes some evidence to be taken into consideration with the other facts of the case.³ Even if the seller gives a description of the goods or makes a statement as to their quality or fitness, the buyer is not entitled to rely indefinitely on that. If the delay has been *primâ facie* excessive, he must show that he could not by any reasonable examination or inquiry have detected earlier the conformity of the goods to the contract.⁴ **§ 621.**
Time allowed for inspection.

The conduct of the seller may be considered in deciding what is a reasonable time, for where by a subsequent misrepresentation he induced the buyer to prolong the trial,⁵ or by his silence acquiesced in the buyer's delay,⁶ or when the delay is caused by the seller's attempts to make the goods after delivery conform to the contract,⁷ such delay does not affect the buyer's rights. Conduct of seller may be considered.

The time for inspection may be limited by custom as in the Liverpool corn market, where the buyer has one day to object to corn as not equal to sample.⁸ Limited by custom.

There is no necessity under section 38 (3) for a joint survey ; twenty-four hours was held to be a reasonable time **§ 622.**
What inspection is allowed.

¹ See s. 118.

² *Bianchi v. Nash*, (1836) 1 M. & W. 545 ; *Beverley v. Lincoln Gas Light Co.*, (1837) 6 A. & E. 829 ; *Couston v. Chapman*, (1872) L. R. 2 H. L. Sc. 250.

³ *Bushel v. Wheeler*, (1850) 15 Q. B. 442 (over 5 months) ; *Hopton v. McCarthy*, (1882) 10 L. R. Ir. 266 ; *Norman v. Phillips*, (1845) 14 M. & W. 277 (6 weeks) ; *Currie v. Anderson*, (1860) 2 E. & E. 592 (one year) ; *Meredith v. Meigh*,

(1853) 2 E. & B. 364 (10 days).

⁴ *Hyslop v. Shirlaw*, (1905) 42 Sc. L. R. 668, 674.

⁵ *Heilbutt v. Hickson*, (1872) L. R. 7 C. P. p. 452.

⁶ *Lucy v. Moulet*, (1860) 29 L. J. Ex. 110 ; *Okell v. Smith*, (1815) 1 Stark. 107.

⁷ *Aird v. Pullan*, (1904) 7 F. 258.

⁸ *Sanders v. Jameson*, (1848) 2 C. & K. 557.

§ 622. to allow.¹ The English and Indian law are the same; there must be a limit to the right to inspect.

§ 623. As regards the nature of the inspection the English rule is the same as the Indian.
What amounts to acceptance.

Under the English law ² the buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them,³ or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller⁴ or when after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.⁵ This section is declaratory of the Common Law and the Indian law is the same⁶; section 118 being substantially the same as far as it goes.

Where goods perish. Acceptance is a voluntary act; if through no fault of the buyer the goods have perished before the buyer has accepted or is deemed to have accepted them, this will not make the fact that they are not returned amount to acceptance.⁷ But unless so excused the fact that the buyer has acted so as to make the return of the goods impossible amounts to acceptance⁸ and except in cases of fraud,⁹ the right to reject is lost.

Mere receipt. Mere receipt is no acceptance,⁹ but will become so if the goods are not rejected within a reasonable time.¹⁰

¹ *Ruttonsey Morarji v. Jumna-das*, (1882) 6 B. 692, citing *Startup v. Macdonald*, 6 M. & G. 593.

² S. of G. Act s. 85.

³ *Saunders v. Topp*, (1849) 4 Exch. 390, 18 L. J. Ex. 374.

⁴ *Parker v. Palmer*, (1821) 4 B. & Ald. 387; *Chapman v. Morton*, (1843) 11 M. & W. 534; *Harnor v. Groves*, (1858) 15 C. B. 667; cf. *Taylor v. G. E. R.*, (1901) 1 K. B. 774.

⁵ *Sanders v. Jameson*, (1848) 2 C. & K. 557; *Heilbutt v. Hickson*, (1872) L. R. 7 C. P. pp. 451, 452, where the cases are reviewed.

⁶ *Haridas Khandelwah v. Kalumull*, (1908) 30 C. 649; *Sumer Chand v. Ardesher*, (1907) W. N. N. W. P. 67; Contract Act s. 118.

⁷ *Taylor v. Caldwell*, (1863) 3 B. & S. 826.

⁸ *Wallis v. Pratt*, (1910) 103 T. L. R. 118 C. A., (1911) A. C. 394 H. L.

⁹ *Hardman v. Bellhouse*, (1842) 9 M. & W. 600; see cases of a carrier receiving goods, § 186.

¹⁰ *Bianchi v. Nash*, (1836) 1 M. & W. 545; *Beverley v. Lincoln Gas Light Co.*, (1937) 6 A. & E. 829; *Couston v. Chapman*, (1872) L. R. 2 H. L. Sc. 250.

Reasonable acts of examination are impliedly authorised by the contract.¹ In order to examine the goods the buyer may use them,² but if he keeps them longer than is necessary³ or uses them in a manner that is not necessary for examination³ he is taken to have accepted them.⁴ Even consumption is permissible, if necessary, for examination.⁵ Marking the goods if the contract is complete, amounts to acceptance.⁶ The test is—has the buyer exceeded his rights of examination under the contract. For if after delivery, the buyer does any act to the goods “of wrong—if he is not the owner, of right—if he is the owner thereof,” the doing of that act is evidence that he has accepted them.⁷ For where he orders them to be delivered to third parties⁸ or resells them in his own name⁹ or resells part¹⁰ or attempts to resell,¹¹ or pledges them,¹² or alters them,¹³ or in any other way exercises rights of ownership over the goods,¹⁴ he accepts them and waives his right to inspection as far as the right to reject the goods is concerned though not the right to claim compensation, and this is so although at the time of doing

§ 623.
Acts of
examination
allowed.

Consumption
of goods.

Acts of
ownership.

¹ *Hopkins v. Appleby*, (1816) 1 Stark. 477; *Poulton v. Lattimore*, (1829) 9 B. & C. 259.

² *Beaumont v. Brengeri*, (1847) 5 C. B. 801; *Harnor v. Groves*, (1855) 15 C. B. 667; Contract Act s. 118, illus. (c), S. of G. Act s. 18 r. 4.

³ S. of G. Act s. 35; *Sanderson v. Jameson*, (1848) 2 C. & K. 557.

⁴ *Heilbutt v. Hickson*, (1872) L. R. 7 C. P. p. 451.

⁵ *Elliott v. Thomas*, (1888) 7 L. J. Ex. 129, 8 M. & W. 170.

⁶ *Bill v. Bament*, (1841) 11 L. J. Ex. 81, 9 M. & W. 36.

⁷ *Parker v. Wallis*, (1855) 5 E. & B. 21.

⁸ *Haridas Khandelwal v. Kalu-*

mull, (1903) 30 C. 649.

⁹ *Chapman v. Morton*, (1843) 12 L. J. Ex. 292.

¹⁰ *Harnor v. Groves*, (1855) 15 C. B. 667; *Chaplin v. Rogers*, (1801) 1 East. 192.

¹¹ *Parker v. Palmer*, (1821) 4 B. & Ald. 387; *Chapman v. Morton*, supra; *Taylor v. G. E. Ry.*, (1901) 1 K. B. 774.

¹² *Kirkham v. Attenborough*, (1897) 1 Q. B. 201 C. A.

¹³ *Maberly v. Sheppard*, (1833) 10 Bing. p. 101.

¹⁴ *Haridas Khandelwal v. Kalu-*
mull, (1903) 30 C. 649; *Sumer*
Chund v. Ardesher, (1907) W. N. N. W. P. 67, All. W. N. 67.

§ 623.
Acting for
the owner.

the act he asserts that he has rejected them.¹ But the act may be done not as owner but for the purpose of preserving the goods for the seller, and if this is proved, then it is not acceptance.²

Conditional
acceptance.

Various text writers refer to conditional acceptance, but the cases they cite refer to receipt of goods under circumstances where inspection cannot at once be made and there is by implication a right to inspect elsewhere,³ or where the seller has impliedly consented to a further trial,⁴ or to cases where there is acceptance under the Statute of Frauds, but not in performance of the contract.⁵

§ 624.
Resale
before an
opportunity
to inspect.

Resale before
inspection.

The mere fact that goods are resold before there is an opportunity to inspect is not acceptance,⁶ but the buyer's right to inspect must be exercised at the first reasonable opportunity; he has *primâ facie* no right to tender the goods to his sub-buyer, and if rejected by him reject them himself,⁷ for he has by tendering acted as owner⁸ and intentionally taken his chance of the goods corresponding to the contract.⁹ Generally the buyer cannot leave it to

¹ *Chapman v. Morton*, (1818) 12 L. J. Ex. 292.

² *Parker v. Wallis*, (1855) 5 E. & B. 21.

³ Chalmers 6th Ed. 79, citing *Heilbutt v. Hickson*, (1872) L. R. 7 C. P. 438.

⁴ *Ibid.*, citing *Lucy v. Moufflet*, (1860) 29 L. J. Ex. 110.

⁵ Campbell, 2nd Ed. 285, citing *Couston v. Chapman*, L. R. 2 H. L. Sc. 254.

⁶ Benj. 5th Ed. 752, but none of the cases there cited are in point, Chalmers 6th Ed., 70.

⁷ *Perkins v. Bell*, (1893) 62 L. J. Q. B. 91 C. A.; *Haridas v. Kalumull*, (1908) 30 C. 649; *Clive Jute*

Mills v. Ebrahim Arab, (1896) 24 C. 177.

⁸ *Hunt v. Hecht*, (1853) 22 L. J. Ex. 293, explaining *Morton v. Tibbett*, (1850) 19 L. J. Q. B. 382, which did not decide that the right to reject remained after resale but the right to inspect to claim damages (a distinction made also in *Biddell v. Clemens*, (1911) 1 K. B. 984 C. A.). The case is however quoted for the first proposition by Benj. 5th Ed. 752, Blackburn 8rd Ed. 20, Campbell 2nd Ed. 284.

⁹ *Wallis v. Pratt*, (1910) 108, L. T. 118 C. A., not affected as to this by reversal in H. L. (1911) A. C. 394.

his sub-buyer to inspect on his behalf, but where goods were ordered to be sent to the buyer packed for resale in America, it was held that as the seller knew that the buyer would not unpack them himself he impliedly agreed to inspection by the sub-buyer in America and that the goods being properly rejected carriage back from America must be paid by the seller.¹ So the parties may expressly agree that goods rejected of sub-buyers may be rejected, and if the defective is latent owing to the seller's fraud it seems rejection is allowable after resale.²

§ 624.

Inspection by
sub-buyer

If goods are accepted without knowledge of latent defects, this is nevertheless a valid acceptance, and this was held to be the case where the defect was incapable of discovery, there being no fraud³ on the part of the seller, though the decision rested mainly⁴ on the ground that the buyer had disposed of the goods before discovery and rendered their return impossible,⁵ and that by disposing of the goods, the buyer intentionally took the chance of the goods not being in conformity with the contract.⁶ But in such a case the buyer unless he has bargained away his right,⁶ can sue for damages.⁷ On appeal the House of Lords held that acceptance in the belief that the goods were according to contract bars the right to reject⁶ and no qualification was made as regards the possibility of returning the goods.

§ 625.

Acceptance
without
knowledge
of defects.

¹ *Molling v. Dean*, (1901) 18 T. L. R. 121.

² *Heilbutt v. Hickson*, (1872) 41 L. J. C. P. 228.

³ Had the defect been fraudulently concealed and the inspection thus rendered ineffective, *Heilbutt v. Hickson*, (1872) 41 L. J. C. P. 228, would have applied, though that decision would not cover cases where the return was impossible, but section 64 would.

⁴ *Bannerman v. White*, (1861) 31 L. J. C. P. 28, was distinguished on this ground.

⁵ But as to this see § 558.

⁶ *Wallis v. Pratt*, (1910) 2 K. B. 1003 C. A. (reversed by H. L. in (1911) A. C. 394; cf. *Drummond v. Van Ingen*, (1887) 2 Ap. Ca. 284, where a buyer resold and the goods were rejected; the defect was not discoverable by any reasonable examination; the only claim made was to set off damages for breach of contract in a suit by the seller for the price.

⁷ See under s. 118 for limitations of this right.

**§ 626.
Dealing
with
documents
of title.**

Retaining documents of title for long periods has been held sufficient acceptance under the Statute of Frauds¹ and is also sufficient as acceptance in performance. So dealing with a bill of lading may amount to acceptance.²

**§ 627.
Acceptance
obtained by
fraud.**

When acceptance has been obtained by fraud it can be retracted;³ so where shoes sold by sample were discovered after acceptance to contain paper in the soles, a defect which no reasonable examination could detect, it was held that they could be rejected.⁴

**§ 628.
Option to
reject.**

A buyer when the property has passed⁵ if he has an option to reject the goods which did not conform to the contract, may exercise that option after the goods are destroyed without his default as against the underwriters,⁶ but when he has no interest in the goods, apparently he cannot as against third persons elect to accept the goods in which he has no property,⁷ and this was held in a case of a sale of a cargo; the view taken was that no property passed until a complete cargo was loaded, and the buyers it was said, although they had insured the whole cargo, could not as against the underwriters, elect to accept the part of the cargo that had been loaded and then destroyed before the cargo was completed.

**§ 629.
Where
seller
refuses
rejected
goods.**

Where a buyer has rightly rejected goods⁸ and the seller refuses or unreasonably delays in taking away his

¹ *Farina v. Home*, (1846) 16 M. & W. 119; *Currie v. Anderson*, (1860) 2 E. & E. 592.

² *Currie v. Anderson*, (1860) 29 L.J. Q.B. 87; *Meredith v. Meigh*, (1853) 22 L. J. Q. B. 401; see *Biddell v. Clemens*, (1911) 1. K. B. 934 C. A.

³ See *Biddell v. Clemens*, (1911) 1. K. B. 934.

⁴ *Hcilbutt v. Hickson*, (1872) L. R. 7 C. P. 458, considered in *Mody v. Gregson*, (1868) L. R. 4 Ex. 49; *Drummond v. Van Ingen*,

(1887) 12 Ap. Ca. 384, 56 L. J. Q. B. 567.

⁵ Lord Hatherly said until he exercised his option no property would pass, for until then he had not bought the goods: *Anderson v. Morice*, (1876) 1 Ap. Ca. p. 730.

⁶ See *Sparkes v. Marshall*, (1836) 2 Bing. N. C. 761, but see *Anderson v. Morice*, p. 735.

⁷ *Anderson v. Morice*, (1876) 1 Ap. Ca. p. 727, 733.

⁸ See § 634.

goods, it has been said that the proper course is for the buyer to give notice that he will resell by such a person for the benefit of the seller.¹ But such a course has been said to be dangerous, it being safer to notify that the goods are at the seller's risk.² If the buyer resells in his own name even after express notice of rejection, it will be deemed an acceptance.³

§ 629.

The buyer can always accept a tender of inferior or wrong goods; and if he chooses to accept beans in performance of a contract to sell him peas, and disposes of them either knowing them to be beans or intentionally taking the chance of their being beans, he cannot say that he did not accept them in the execution of the contract, for he had no right to dispose of them except as purchaser under the contract: he cannot impose on the vendor a new contract to sell beans at a fair price, and sue him on the old contract to sell peas: he can sue on the warranty,⁴ that the goods delivered were peas, and recover damages, but he cannot keep the beans and sue for the peas.⁵

§ 630.
Effect of
accepting
goods
which are
not of the
contract
quality.

It is frequently said that the tender of goods which do not answer to the contract is a fresh offer and acceptance makes it a new contract, but this is misleading. In such a case the result doubtless resembles the effect of a fresh offer which requires acceptance, but it is, if accepted, a substituted contract and not a fresh one.⁵

Not a fresh
contract.

Where there has been a reference to arbitration to decide whether the goods are according to the warranty, and an allowance has been made by the arbitrator, the buyer cannot afterwards sue for breach of warranty.⁶

§ 631.
Effect of
arbitration.

¹ Smith; *Mercantile Law* 10th Ed. 660.

² *Grimoldby v. Wells*, (1875) L. R. 10 C. P. 891; see S. of G. Act s. 36.

³ *Chapman v. Morton*, (1843) 12 L. J. Ex. 292.

⁴ Meaning that the original condition has become a warranty;

the H. of L. on appeal objected to this phrase.

⁵ *Wallis v. Pratt*, (1910) 108 T.L.R. 118, 124 C.A.; (1910) 2 K.B. 1003, reversed in (1911) A.C. 394, but not affected on this point.

⁶ *C. Fornaro v. Ramnarain Sookdeb*, (1875) 14 B. L. R. 180, bench.

§ 632.
Notice of
rejection.

Apparently notice of rejection must be given in India promptly, as in the case of any other election.¹

Sec. 118.
Right of
buyer on
warranty
in respect
of goods
not ascer-
tained.

Where there has been a contract, with a warranty, for the sale of goods which, at the time of the contract, were not ascertained or not in existence, and the warranty broken, the buyer may accept the goods or refuse to accept the goods when tendered, or keep the goods for a time reasonably sufficient for examining and trying them, and then refuse to accept them; provided that during such time, he exercises no other act of ownership over them than is necessary for the purpose of examination and trial.

In any case the buyer is entitled to compensation from the seller for any loss caused by breach of warranty; but if he accepts the goods and intends to claim compensation he must give notice of his intention to do so within a reasonable time after discovering the breach of warranty.

Illustration.

- (a) *A* agrees to sell and, without application on *B*'s part, deliver to *B* 200 bales of unascertained cotton by sample. Cotton not in accordance with sample is delivered to *B*. *B* may return it if he has not kept it longer than a reasonable time for the purpose of examination.
- (b) *B* agrees to buy of *A* twenty-five sacks of flour by sample. The flour is delivered to *B*, who pays the price. *B* upon examination, finds it not equal to sample; *B* afterwards uses two sacks and sells one. He cannot now rescind the contract and recover the price, but he is entitled to compensation from *A* for any loss caused by the breach of warranty.
- (c) *B* makes two pairs of shoes for *A* by *A*'s order. When the shoes are delivered, they do not fit *A*. *A* keeps both pairs for a day. He wears one pair for

¹ See § 552, and for a contrary view in England: *Coulson v. Attwood*, (1857) 26 L.J. Ex. 244.

a short time in the house, and goes for a long walk out-of-doors in the other pair. He may refuse to accept the first pair, but not the second. But he may recover compensation for any loss sustained by the defect of the second pair.

Sec. 118.
Illustrations.

The section represents the English law under which a stipulation as to unascertained goods is generally a condition though it would seem to be a better view to treat it as part of the bargain. The buyer can reject if, on examination, the goods prove not to be as warranted,¹ or without rejecting can sue for breach of warranty, notwithstanding that he has paid the full price² or resold the goods.³

§ 633.

Rights of
buyer.

Under the Civil Procedure Code the somewhat inconvenient rule prevails that the buyer cannot set off damages for breach of warranty as in England.⁴ But this only relates to a legal set off and at equity such a set off is allowable in India in commercial cases.⁵ Damages for breach of warranty are unliquidated and may exceed the value of the goods.⁶ Defective quality may render the goods valueless.⁷

Set off.

Damages.

The buyer who rightly rejects goods, need not return them; it is sufficient if he gives clear notice of rejection and that they are of the seller's risk.⁸

§ 634.
Buyer's
duty on re-
jection.

It would seem that the notice of rejection must be given promptly as the seller has the right to make a second tender if he can do so in time.⁹

Notice of
rejection.

¹ *Heilbutt v. Hickson*, (1872) L. R. 7 C. P. 438.

L. R. 3 Q. B. 197.

² *Davis v. Hedges*, (1871) L. R. 6 Q. B. 687.

⁷ *Poulton v. Lattimore*, (1829) 9 B. & C. 259, 32 R. R. 673.

³ Contract Act s. 78 illus. (m).

⁸ *Grimoldby v. Wells*, (1875) L. R. 10 C. P. 391; *Suma Chand v. Ardesher*, (1907) All. W. N. 67; *Gan Kim Swee v. Ralli*, 13 C. 237 P.C.; *Lucy v. Mouflet*, (1860) 29 L. J. Ex. 110, S. of G. Act 386, see § 629.

⁴ S. of G. Act s. 53.

⁵ See Woodroffe's Civil Pro. Code.

⁶ Contract Act s. 78 illus. (m); *Smith v. Green*, (1875) 1 C. P. D. 92; *Bostock v. Nicholson*, (1904) 1 K. B. 725; *Jones v. Just*, (1868)

⁹ *Borrowman v. Free*, (1879) 48 L. J. Q. B. 65, 4 Q. B. D. 500; see § 184.

§ 635.
Notice of
claim for
compensa-
tion.

Notice of a claim of compensation is sometimes necessary in England, but generally it is not.¹ But under the section it is a condition precedent in India in the case of a sale of unascertained goods, but the time for giving notice is not within a reasonable time after acceptance, but after the discovering of the breach of the stipulation.² No such provision is enacted in section 117 as regards sales of specific goods, and apart from questions of *bonâ fides*, the time for claiming compensation is only limited by the Limitation Act. The somewhat similar requirements of section 55 in the case of performance accepted after due date do not affect section 117, for notice under section 55 must be at the time of acceptance. In England it has been held that full payment on delivery and even payment of the full balance of the price after delivery is no bar to a claim for compensation for late delivery³ which it is in India where notice of such a claim must be given at the time of acceptance.⁴

Late
delivery.

§ 636.
Other war-
rants im-
plied by
law.

There are other warranties⁵ provided for by the Indian law. Thus a bailor warrants his title to bail,⁶ so there is an implied warranty of title where an interest in immoveable property is transferred by a seller or mortgagor.⁷ So a bailor impliedly warrants that the thing bailed is free from faults which materially interfere with the use of it, or expose the bailor to extraordinary risks.⁸

Exchange of
money.

Where money is exchanged each party warrants the genuineness of the money given by him.⁹

Debts.

When a transferor of a debt warrants the solvency of the debtor the warranty (in the absence of a contract to

¹ *Morten v. Marshall*, 2 H. & C. 305, Benj. 5th Ed. p. 1009. repudiation if broken.

⁶ C. A. s. 164.

² Section 118.

⁷ Act IV of 1882, s. 55 (2) 66 a, 120.

³ *Clydebank Engineering Co. v. Don Jose*, (1905) A. C. 6.

⁸ C. A. s. 150; the English rule is different: *Bamfield v. Goole*, (1910) 2 K. B. 94, 104 C. A.

⁴ Section 55.

⁵ All are conditions in the English sense, that is justify

⁹ Act IV of 1882 s. 121.

the contrary) applies only to his solvency at the time of the contract, and is limited when the transfer is made for consideration to the amount in value of such consideration.¹

§ 636.

Other warranties.

Beside these statutory warranties, there are other cases as where a man purports to act as an agent, he warrants his authority to so act.²

So a carrier of passengers or goods³ warrants that his carriage is safe; and persons offering accommodation for persons or goods warrant the safety and sufficiency of that accommodation.⁴

A professional man employed for reward warrants that he is reasonably skilful and competent.⁵

The duration of a warranty may be expressly limited by the contract,⁶ as for instance to a month's trial.⁷

§ 637.

Duration of a warranty.

In the case of a ship demised by charter warranted of a particular class, that was held not to be a continuing warranty but only to apply to its state at the time when the charter was made.⁸ So where a safe was sold as burglar proof, and six years afterwards it was easily broken open by burglars, it was held there was no warranty for perfect security for all time which if valid at all would require to be express.⁹

¹ Act IV of 1882 s. 134.

² *Gillan v. Wright*, 7 E. & B. 301, 8 E. & B. 647; *Yonge v. Toynbee*, (1910) 1 K.B. 215 (full discussion).

³ *Turner Morrison v. Ralli*, (1869) 2 B. L. R. O. C. 127, 135 (seaworthiness).

⁴ *Francis v. Cockrell*, (1870) L. R. 5 Q. B. 184, 501.

⁵ *Grill v. General Iron Screw Collier Co.*, L. R. 1 C. P. 612.

⁶ *Rywater v. Richardson*, (1834) 3 L. J. K. B. 164; *Chapman v. Gwyther*, (1866) L.R. 1 Q. B. 463, 35 L.J.Q.B. 142; *Moore v. Harris*,

(1876) 1 Ap. Ca. 318, 329, (even as to latent defects), 45 L.J. P. C. 55; *Hinchcliffe v. Barwick*, (1880) 49 L. J. Ex. 495; *Smart v. Hyde*, (1841) 10 L. J. Ex. 479.

⁷ *Sharp v. G. W. Ry.*, (1841) 9 M. & W. 7 after which trial no claim for defect, except in case of fraud, can be made.

⁸ *French v. Newgass*, (1878) L. R. 3 C. P. D. 163 C. A.; 47 L. J. C. P. 361.

⁹ *Walker v. Milner*, (1866) 4 F. & F. 745.

§ 637. There may be a warranty for a subsequent period, that is that a horse will become sound.¹

Miscellaneous.

Section 119. When the seller sends to the buyer goods not ordered with goods ordered, the buyer may refuse to accept any of the goods so sent, if there is risk or trouble in separating the goods ordered from the goods not ordered.

When the buyer may refuse to accept, if goods not ordered are sent with goods ordered.

Illustration.

A orders of *B* specific articles of china. *B* sends these articles to *A* in a hamper, with other articles of china which had not been ordered. *A* may refuse to accept any of the goods sent.

§ 638. **Indian Rule.** The section seems to be founded on *Levy v. Green*,² but does not adopt the distinction which the majority of the judges drew in that case between cases in which the excess was of the same kind as ordered and cases in which it was not.

§ 639. **Common Law where too many of the right kind sent.** At Common Law, if too many goods were sent of the contract quality, it was the general rule that as no goods could be said to be appropriated to the contract, the buyer could reject all; it was no answer that he could select what he liked, for that would be forcing a new contract on him.³ But where 200 bales were ordered and 206 shipped and the buyer refused to accept all or any of them, the Court allowed the plaintiff after suing for non-acceptance of 206 bales to amend his declaration, holding it to be insufficient for want of an averment that they were ready and willing to deliver 200 only.⁴ But unless the excess came within the rule of *de minimis*,⁵ or the refusal to

¹ *Lidlard v. Kain*, (1824) 3 L.J.O. S.C.P. 246; 27 R. R. 582.

² (1857), 28 L. J. Q. B. 819.

³ *Cunliffe v. Harrison*, (1851) 6 Ex. p. 906, 86 R.R. 548 (15 hogs-heads sent instead of 10); *Hart v. Mills*, (1846) 15 M. & W. 85 (4 dozen of wine instead of 2

dozen), S. of G. Act. s. 302; even if the contract is for a named quantity more or less the excess must be reasonable: *Cross v. Eglin*, (1831) 2 B. & Ad. 106.

⁴ *Dixon v. Fletcher*, (1837) 3 M. & W. 145.

⁵ See. § 518.

take any part of the goods was, as Brett, L. J., said in *Reuter v. Sala*,¹ a waiver of any tender of a less quantity, the case seems of dubious authority. Where the contract was for about 4,000 cases² and the rule of the Trade Association was that "about" meant 5 per cent. more or less, a tender of 4,202 cases was held to be bad.³ But in a recent case the rule *de minimis* was held to apply where the excess, was 55 lbs. the contract being for 4,950 tons of coal, but solely on the ground that there was nothing to show that the sellers would have insisted on payment for the excess. For the reason why an excess in tender entitles the buyer to reject is that the seller seeks to impose upon the buyer a burden which he is not entitled to impose.⁴ If the buyer accepts an excessive quantity he must pay for it.⁵ Where more cotton was delivered than ordered, and the seller suggested the buyer should select such as answered to the contract, Erle, C. J., said if the seller sends more goods than are ordered, and trouble or risk is thereby imposed upon the buyer in ascertaining what is and what is not in accordance with the contract, the buyer is not bound to accept.⁶

§ 639.

Where too many goods of same kind tendered.

De minimis.

The cases do not therefore seem to have been harmonious, but the Sale of Goods Act⁷ has adopted the rule in *Cunliffe v. Harrison*.

Excessive delivery of same kind.

Section 119 is not so exacting as the Sale of Goods Act,⁷ but is so worded as to leave it doubtful whether it applies

¹ (1879), 48 L. J. C. P. 492.

² See too *Tanvaco v. Lucas*, (1859) 28 L. J. Q. B. 150 (tender of bill of lading for 2,215 quarters of wheat instead of 2,200, held bad though quantity actually on board correct); *Tanvaco v. Lucas*, 28 L. J. Q. B. 301 (where bill of lading stated correct quantity, but slight excess on board).

³ *Frangopulo v. Lomas*, (1901) 17 T. L. R. 437 (reversed on appeal, 18 T. L. R. 461, as the excessive tender had been waived,

how does not appear).

⁴ *Shipton v. Weil*, (1912) 29 T. L. R. 269, following a dictum in *Harland v. Bursall*, (1901) 6 Com. Cas. 113.

⁵ Cf. S. of G. Act, s. 30 (2), under which he must pay at the contract rate. The C. L. was the value of the excess must be paid, Benj. 5th Ed., 699.

⁶ *Rylands v. Krcitman*, (1865) 19 C. B. N. S. 351.

⁷ Section 30 (2).

to excess of the same kind, for the word 'mixed' does not seem appropriate in such a case; but under section 39 the exact performance of a contract is essential.¹

§ 640.
Mixed with
other
different
goods.

The rule, where the goods ordered were delivered mixed with other goods was clear²; the buyer could reject all. The seller, even if the wrong goods were clearly distinguishable, had no right to impose on the purchaser the onus of unpacking the goods and separating those that he had bought from others³; but it was said in *Levy v. Green*⁴ that the right to reject did not arise in every case, but if there is any danger or trouble attending the severance of the two, or any risk that the vendee might be held to have accepted the whole if he accepted his own, he might refuse to accept any at all.

So where a seller mixed inferior coal with the coal ordered, the buyer was held entitled to reject.⁵

In a case where clothing was ordered of certain sizes and one bale was delivered containing sizes ordered mixed with other sizes, it was held that the buyer could reject.⁶ It would depend on the facts whether he could in India.

Mixed
delivery.

Where twelve out of 600 articles ordered were of the wrong description, it was argued that the rule in *Levy v. Green*, did not apply; the error being within the rule *de minimis*. The seller had offered at the trial to exchange these twelve. Farwell, L. J., considered that *Levy v. Green* did apply, but partly on the ground that half the goods delivered were defective, and held that the buyer was entitled to reject the whole batch.⁷

¹ See as to the rule *de minimis*, Q. B. 319.
§ 518.

² The S. of G. Act s. 30 (3) gives a right of rejection in every case.

³ *Levy v. Green*, (1857) 28 L. J. Q. B. 319.

⁴ (1859), E. & E. p. 976, 28 L.J.

⁵ *Nicholson v. Bradfield Union*, (1866) 35 L. J. M. C. 176, L. R. 1 Q. B. 620.

⁶ *Tarling v. O'Riordan*, (1878) 2 L. R. Ir. 82 C. A.

⁷ *Jackson v. Rotax Co.*, (1910) 2 K. B. 937 C. A. 948.

Where there is a delivery of the correct amount, but some portions are not of the contract kind, under the English law the seller is not entitled to demand that the buyer shall pick out the various portions that are good and pay for them.¹

§ 641.
Where correct quantity but some defective.

The same view was taken in India before the Contract Act,² and it was said that the buyer was undoubtedly entitled to call upon the sellers to separate the goods which did not satisfy the contract from the rest.³

In contracts for goods, all of which are to be of a particular standard, it seems the buyer may select those which are correct, if the contract is construed as separate for each item.³

Standard quality.

But unless so construed, part acceptance under contract which is not severable, precludes rejection of the rest for non-conformity with the contract.⁴

Part acceptance.

There is very little authority to show what is meant by risk or trouble. In the cases previously cited no instance is to be found of anything which was not risk or trouble, save in *Dixon v. Fletcher*,⁵ where 8 bales too many were delivered. In fact it seems that in cases of excess of the contract kind, the Indian Courts will follow the English rulings, as there is a risk of accepting the whole if an attempt is made to select the correct quantity. Both *Levy v. Green* and the illustration to the section show what slight trouble is sufficient, namely unpacking from one receptacle; therefore, if there are several packages, there must be more trouble as the buyer cannot, as a rule, say in which the goods ordered are.

§ 642.
What amounts to risk or trouble.

The buyer's position is that he can avoid the contract, but must make compensation for any advantage received

§ 643.
Position of buyer.

¹ *Jackson v. Rotax Co.*, (1910) 2 K. B. p. 949 C. A.

L.R. 217; cf. *Biggerstaff v. Rowatt*, (1896) 2 Ch. 93.

² *A. B. Miller v. The Gourpore Co.*, (1871) 8 B. L. R. 285, 297.

⁴ See § 563.

³ *Molling v. Dean*, (1902) 18 T.

⁵ (1837), 3 M. & W. 145.

§ 643. under the contract,¹ *i.e.* pay for what he accepts, where he is entitled to accept part only² and can sue for damages for non-delivery.³ The price payable for the part accepted, it seems, is the value and not the contract rate.⁴

Value of part accepted. The Common Law rule that the buyer must pay the value of what he accepts when less than an entire quantity is delivered, has been changed by the Sale of Goods Act in England, under which he must pay at the contract rate.

Usage. The rules of the section and as to deliveries of less than the quantity ordered may be subject to trade usage.⁵

§ 644. No duty to return rejected goods. As to the rejected goods, there is no duty cast on the buyer, unless he has so contracted, to return them: all he need do is to give reasonable notice of rejection to the seller⁶; and this is so, although the place of delivery and the place for rejection, *i.e.* for inspection, are not the same⁷ for there is no reason for throwing on the buyer the burden of a situation caused by no fault of his.⁸

§ 645. Contracts for 'about.' The contract may be for "about" so much, and then it is a question of construction,⁹ whether it has been performed.

¹ Contract Act s. 65 illus. (b), but there may be a second tender, see § § 172, 184.

² See Part Acceptance, § 568.

³ Section 75.

⁴ *Macfarlane v. Carr*, (1872) 8 B.L.R. 459.

⁵ *Moore v. Campbell*, (1854) 10 Exch. 323, 23 L. J. Ex. 310.

⁶ Cf. S. of G. Act s. 36; *Grimoldby v. Wells*, (1875) 44 L. J. C. P. 203, see p. 637.

⁷ *Hcilbutt v. Hickson*, (1872) L. R. 7 C. P. 433.

⁸ See *Molling v. Deen*, (1902) 18 T. L. R. 217 (for the expenses of returning).

⁹ *Lockerell v. Aucompte*, (1857) 26 L. J. C. P. 194.; *McConnell v. Murphy*, (1873) L. R. 5 P. C. 203; see *Moore v. Campbell*, (1854) 10 Exch. 323, 23 L. J. Ex. 310, as to a custom importing the term. See § 279. The construction of such words depends on the subject matter: *Morris v. Levison*, (1876) 1 C.P.D. 155.

Where qualifying words are used with regard to a specified quantity of goods deliverable by stated instalments, the words qualify the whole amount and not the amount of such instalments.¹ If the amount of each instalment is not fixed, it must be reasonable.²

§ 645.

Amount of instalments.

The seller may, if he can within time, make a second tender and so complete the contract, although the first was properly rejected.³

Second tender.

As the seller does not fulfil his contract by delivering a less quantity than he contracted to sell, so conversely, if a man contracts to buy 150 quarters of wheat, he is not at liberty to call for a small portion without being prepared to receive the whole quantity,⁴ unless of course he has stipulated for so doing, or the such a right is implied from the facts of the case.⁵

§ 646.

Buyer cannot demand less.

The next question to be considered is the seller's position if the buyer refuse to accept the goods.

If a buyer wrongfully refuses to accept the goods sold to him, this amounts to a breach of the contract of sale.

Section 120. Effect of wrongful refusal to accept.

With this section must be read sections 39, 51, of the Contract Act.

The section is a particular instance of a wider rule which gives a right of action for damages to one party to a contract if and when the other party clearly shows his intention not to be bound by, and to repudiate the contract before the time for performance.⁶

§ 647.

When the contract is repudiated.

¹ *Societe Anonyme v. Scholefield*, 184. (1902) 7 Com. Cas. 114 C. A.

⁴ *Kingdom v. Cox*, (1848) 5 C. B. 522, 526.

² *Nederlandsche Cacao Fabrik v. D'Challen*, (1898) 14 T. L. R. 322; *Societe Anonyme L'Ind. etc. v. Scholefield*, (1902) 7 Com. Cas. 114 (5 per cent. variation allowable by custom).

⁵ *Colonial Ins. Co. v. Adelaide Ins. Co.*, (1886) 12 A. C. pp. 188, 189.

³ *Borrowman v. Free*, (1878) 4 Q.B.D. 500 C.A.; see §§ 172 &

⁶ *Purshotamdas v. P.*, (1896) 21 B. 23; see under 'Waiver of Conditions Precedent' § 550.

§ 647.
Effect of
insolvency.

Insolvency alone does not justify rescission.¹ But a notification by a party of his insolvency may be taken as presumptively importing an offer to rescind which the other party may accept²; and it would at least justify a refusal to complete the contract, unless the insolvent or his representative should prove their ability and readiness to complete on their part³ by tendering the price, for all credit expires on insolvency.

Wrongful
refusal.

The section only refers to a wrongful refusal.

§ 648.
Rights of
the seller.

If the property has not been divested out of the vendor, he cannot bring an action for the price; for he cannot have both the goods and the price⁴; but he can sue for damages for non-acceptance⁵; and the measure is the difference between the agreed rate and the market value of the goods at the time when the buyer ought to have accepted⁶: Addison adds⁷ "in addition to the cost, charges and expenses necessarily incurred by the vendor in fulfilling his part of the contract." But this is clearly wrong: the contract price must cover all such: the seller can only claim necessary charges incurred owing to the breach of the contract.⁸ The seller may also treat an unqualified refusal by the purchaser to accept as a repudiation of the contract once for all, and sue immediately. The measure of damages is the same in either case.⁹

¹ *Ex parte Stapleton*, (1879) 10 C. D. 586; *Ex parte Tondeur*, L.R. 5 Eq. 160, 37 L. J. Ch. 121; see § 240.

² Leake, 5th Ed. p. 621.

³ *Ex parte Chalmers*, L. R. 8 Ch. 294, 42 L. J. B. 37.; *Morgan v. Bain*, (1875) L. R. 10 C. P. 15, 44 L. J. C. P. 47; *re Phoenix*, (1876) 4 C. D. 108; 46 L. J. Ch. 115; Sale of Goods Act, s. 18 (1).

⁴ Addison, 11th Ed. p. 584; for other rights see § 449.

⁵ Cf. Sale of Goods Act s. 50 (1).

⁶ Contract Act, s. 73; S. of G. Act s. 50 (2).

⁷ 11th Ed. p. 584.

⁸ Contract Act, s. 73.

⁹ *Cort v. Ambergate Ry.*, (1851) 17 Q. B. 127; *Hockster v. De La Tour*, (1858) 2 E. & B. 687.

When goods sold have been delivered to the buyer, the seller is not entitled to rescind the contract on the buyer's failing to pay the price at the time fixed, unless it was stipulated by the contract that he should be so entitled.

Section 121.
Right of seller as to rescission on failure of buyer to pay price at time fixed.

A party who is entitled to rescind can only do so in so far as the contract has not been performed,¹ and subject to section 64 he must disaffirm the entire contract².

For cases where the seller can disaffirm a contract of sale and revest the property in himself, *see* under section 108, exception 3.

After delivery the seller's sole remedy is, as a rule, by personal action. He is only a creditor and all special remedies *qua* seller are gone. If part of the goods is delivered and the buyer repudiates the contract, the seller can sue for the value of any goods retained by the buyer.³

§ 649.
After delivery.

If he retakes the goods after sale and complete delivery the contract is not rescinded.⁴

A seller has no right to follow the goods except in the case of fraud or unless the person receiving them is a party to the contract on which the goods were delivered,⁵ and then only under section 121, by virtue of a special term.

Following goods.

If the delivery was induced by fraud,⁶ on notice thereof the seller can disaffirm the contract and retake possession of goods delivered thereunder,⁷ but not, it seems, without resorting to legal process.

Delivery induced by fraud.

¹ Section 55 Contract Act.

⁴ *Page v. Cowasjee*, (1866) L.R.

² *See* notes to *Smith v. Hodson*, (1791) 4 T. R. 211, 1 Sm. L. C. 152, and § 558.

1 P.C. 27.

⁵ *Armstrong v. Stokes*, (1872) 41 L. J. Q. B. 253.

³ *Bartholomew v. Markwick*, (1863) 15 C.B.N.S. 711; 33 L.J. C. P. 145; *Wayne's Merthyr Coal Co. v. Morewood*, (1877) 46 L.J. Q.B. 746.

⁶ But *see* for limits to this right, § 501.

⁷ *Re Eastgate*, (1905) 1 K. B. 465.

§ 649.
By innocent
misrepresentation.

It seems uncertain whether the same right is allowed in England in the case of a contract induced by innocent misrepresentations, if the contract has been executed.¹

But in India it seems the seller's rights are the same whenever he is entitled to disaffirm a contract.

Recaption.

Sutherland² says: "the Common Law, gave the right of recaption in certain very special cases." But the cases cited are cases of a person taking his own goods from the premises of another. And apparently he may do so if the other has detained them, even if he has to break open the doors or pick locks.³

¹ See *Seddon v. N. E. Salt Co.*, 347, 349.
(1905) 1 Ch. 326.

² Sutherland's Indian Contract Act, citing *Blades v. Higgs*, (1861)
10 C. B. N. S. 713, 30 L. J. C. P.

³ *Burridge v. Nicholelts*, 6 H. & N. 383, 30 L. J. Ex. 145, 147, 149.

CHAPTER XVII.

Rights of the Buyer.

The right of a buyer depend on whether the property in the goods has passed and whether there has been delivery. **§ 650.
Right of
the buyer.**

If the property has not passed the buyer has no right to the goods, for there are none to which the contract has attached. His only remedy for failure to deliver is an action for damages. If the seller fails to deliver within the time allowed by the contract, the buyer may, if time is of the essence, avoid the contract and sue for damages ; if time is not of the essence, he can only wait until the delay amounts to a repudiation. If the seller properly tenders before that time he must accept the goods. Where pro-
perty has not
passed.

Where the seller makes a defective tender, the buyer may reject the goods, for his obligation to accept depends on the sufficiency of the tender,¹ and unless there is a stipulation in the contract to the contrary² or a waiver of the conditions precedent, it is a complete defence for the buyer to show that the delivery offered was not in accordance with the contract, though as shown above the onus of proving that the goods do so correspond is on the plaintiff.⁴ This is so even if the action is not for non-acceptance, but on a bill given for the price.⁵ **§ 651.
Defective
tender.**

Or the buyer may accept defective goods and claim compensation for any defect, but in the case of originally unascertained goods only if he gives notice within a Right to
accept defec-
tive tender.

¹ *Hannuic v. Goldner*, (1843) 11 (1872) L. R. 7 C. P. p. 451.
M. & W. 849.

⁴ *Ante* § 287.

² *Heyworth v Hutchinson*, (1867)
86 L. J. Q. B. 270.

⁵ *Wells v. Hopkins*, (1839) 5 M.
& W. 7 ; cf. *Warwick v. Nairn*,

³ *Sanders v. Jameson*, (1848) 2 (1855) 10 Ex. 762.
C. & K. 557 ; *Heilbutt v. Hickson*,

§ 651. reasonable time after discovery of the breach of condition.¹ The position is the same where the seller has not performed a condition precedent unless there has been waiver.²

But if the failure relates to a stipulation which by the terms of the contract is not of the essence of the contract, the buyer's only remedy is to claim compensation.

Pleading
breach of
warranty as
set off.

Wherever the buyer can claim compensation he may if he has not paid the price, plead the breach in reduction³ or extinction⁴ of the price if sued for the price,⁵ and may also sue for any further damage which he has suffered.⁶

Clause
against com-
pensation.

The contract may, by a special condition in that behalf, prevent any claim for compensation and only leave a right of rejection.⁷ And if it depends on a contingency which does not happen, neither party has any rights, unless the non-occurrence is due to the default of either.

Only one
suit.

If under one contract the buyer fails to pay for goods delivered and fails to accept the rest, the seller is only entitled to bring one suit against him,⁸ except under an instalment contract where each instalment is to be treated as a separate contract.⁹

§ 652.
Damages
recoverable
by the
buyer.

The measure of damages recoverable for breach of contract was in an uncertain state in England, and

¹ See § 635.

² See under "Conditions."

³ *Shoshi Mohun Pal v. Noho Kristo*, (1878) 4 C. 801.

⁴ *Poulton v. Lattimore*, (1829) 9 B. & C. 259.

⁵ If the suit is on a bill or note he can only bring a cross action: *Byles on 'Bills'*, 16th Ed., 156; *Agra and Masterman's Bk. v. Leighton*, (1866) 36 L. J. Ex. 33.

⁶ *Mondel v. Steel*, (1841) 8 M. & W. 858, *see* S. of G. Act s. 53

(4); *Davis v. Hedges*, (1871) L. R. 6 Q. B. 687.

⁷ *Jacobs v. Revell*, (1900) 2 Ch. 858, 69 L. J. Ch. 879; *Jackson's 'Contract'*, (1905) 1 Ch. 603, 74 L. J. Ch. 889.

⁸ *Duncan Bros. v. Jectmull*, (1892) 19 C. 372, following *Wilson J. in Anderson Wright v. Kalagarla*, (1885) 12 C. 339, but *see ibid.* p. 341.

⁹ So held in *Volkart v. Sabjee* (1896) 19 M. 304.

consequently a very elaborate judgment on the question was given in *Hadley v. Baxendale*,¹ which is the leading case in England, although many suggestions modifying the rules laid down therein have been made²; but no case previous to that decision is of much value in England, and even after that case the whole question was said to be in uncertainty.³ Section 73 of the Contract Act has laid down the Indian law and was, it seems, intended to be exhaustive, and certainly gives no countenance to the modifications suggested to the rules² in *Hadley v. Baxendale*.⁴

§ 652.
English law
in 1872.

The Contract Act provides that "when a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the

Section 73.

¹ (1854) 9 Ex. 341, 23 L.J. Ex. 179.

² E.g., that a party after contract can give notice of any particular consequences which will result from a breach of the contract, and then can claim such if the other party persist in breaking it; see *Gee v. L. & Y. Ry. Co.*, (1860) 6 H. & N. 211; *Simpson v. L. & N. W. Ry.*, (1876) 1 Q. B. D. 274; *Horne v. M. Ry.*, (1872) L.R. 7 C. P. 583, 8 C. P. 131. This is very dubious, but is approved in Blackburn 3rd Ed., p. 552. A further qualification is that notice of special circumstances is not enough, unless it is shown that the seller assented to be liable for special damages: *Horne v. M. Ry.*, (1873) L. R. 8 C. P. 131; *British Columbia Sawmill Co v. Nettleship*, (1868) L. R. 3 C. P. 499, 509, approved in Benj. 5th Ed. 973, citing *Elbinger v. Armstrong*, (1874) L.R. 9 Q.B. pp. 478, 479; in Mayne on 'Damages,'

and in the Laws of Eng. vol. 10, see *Simpson v. L. & N. W. Ry.*, (1876) 1 Q. B. D. p. 278: but this does not exist in India and is doubtful in England: see *Hydraulic Eng. Co. v. McHaffie*, (1878) 4 Q.B.D. p. 677; *Hammond v. Bussy*, (1897) 20 Q.B.D. 79, 97; *Agins v. G. W. Coliery*, (1899) 1 Q. B. 413, and Pollock on 'Contracts.' A further suggestion is that a fraudulent breach of warranty gives a buyer larger rights (save that he can rescind the contract after acceptance if he can return the goods unaltered): see Chalmers 6th Ed. 112; *Houldsworth v. City of Glasgow Bank*, (1890) 5 A.C. 317, 323, 388; Sm. L. C. 11th Ed. Vol. II, 550, citing *Ludgater v. Love*, (1881) 44 L. T. 694; *Mallett v. Mason*, L. R. 1 C. P. 559: but this does not apply in India.

³ *Gee v. L. & Y. Ry.*, (1860) 6 H. & N. 211.

⁴ (1854) 9 Ex. 341.

§ 652.
Section 73 of
the Contract
Act.

contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew¹ when they made the contract to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Mitigating
loss.

Explanation.—In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

Illustrations.

- (a) *A* contracts to sell and deliver 50 maunds of saltpetre to *B* at a certain price, to be paid on delivery. *A* breaks his promise. *B* is entitled to receive from *A*, by way of compensation, the sum, if any, by which the contract price falls short of the price for which *B* might have obtained 50 maunds of saltpetre of like quality at the time when the saltpetre ought to have been delivered.
- (b) *A* hires *B*'s ship to go to Bombay, and there take on board, on the 1st January, a cargo which *A* is to provide, and to bring it to Calcutta, the freight to be paid when earned. *B*'s ship does not go to Bombay, but *A* has opportunities of procuring suitable conveyance for the cargo upon terms as

¹ Apparently this is the same as the Common Law rule and means what a reasonable man, if he applied his mind, would contemplate as the probable consequence of a breach: see Chalmers' 6th Ed. p. 113; in *Hadley v. Baxendale*, (1854) 9 Ex. 341, the rule was said to be "the damages" should be such as may fairly and

reasonably be considered either arising naturally, *i.e.* according to the usual course of things—from such breach of the contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it.

advantageous as those on which he had chartered the ship. *A* avails himself of these opportunities, but is put to trouble and expense in doing so. *A* is entitled to receive compensation from *B* in respect of such trouble and expense.

§ 652.
Contract Act,
section 73.

- (c) *A* contracts to buy of *B*, at a stated price, 50 maunds of rice, no time being fixed for delivery. *A* afterwards informs *B* that he will not accept the rice if tendered to him. *B* is entitled to receive from *A*, by way of compensation, the amount, if any, by which the contract price exceeds that which *B* can obtain for the rice at the time when *A* informs *B* that he will not accept it.
- (d) *A* contracts to buy *B*'s ship for 60,000 rupees, but breaks his promise. *A* must pay to *B*, by way of compensation, the excess, if any, of the contract price over the price which *B* can obtain for the ship at the time of the breach of promise.
- (e) *A*, the owner of a boat, contracts with *B* to take a cargo of jute to Mirzapur, for sale at that place, starting on a specified day. The boat owing to some avoidable cause, does not start at the time appointed, whereby the arrival of the cargo at Mirzapur is delayed beyond the time when it would have arrived if the boat had sailed according to the contract. After that date, and before the arrival of the cargo, the price of jute falls. The measure of the compensation payable to *B* by *A* is the difference between the price which *B* could have obtained for the cargo at Mirzapur at the time when it would have arrived if forwarded in due course and its market price at the time when it actually arrived.
- (f) *A* contracts to repair *B*'s house in a certain manner, and receives payment in advance. *A* repairs the

§ 652.
Contract Act,
section
73, illus.

house, but not according to contract. *B* is entitled to recover from *A* the cost of making the repairs conform to the contract.

- (g) *A* contracts to let his ship to *B* for a year, from the 1st of January, for a certain price. Freight rises, and on the 1st of January, the hire obtainable for the ship is higher than the contract price. *A* breaks his promise. He must pay to *B*, by way of compensation, a sum equal to the difference between the contract price and the price for which *B* could hire a similar ship for a year, on and from the 1st of January.
- (h) *A* contracts to supply *B* with a certain quantity of iron at a fixed price, being a higher price than that for which *A* could procure and deliver the iron. *B* wrongfully refuses to receive the iron. *B* must pay to *A*, by way of compensation, the difference between the contract price of the iron and the sum for which *A* could have obtained and delivered it.
- (i) *A* delivers to *B*, a common carrier, a machine, to be conveyed, without delay, to *A*'s mill, informing *B* that his mill is stopped for want of the machine. *B* unreasonably delays the delivery of the machine, and *A*, in consequence, loses a profitable contract with the Government. *A* is entitled to receive from *B*, by way of compensation, the average amount of profit which would have been made by the working of the mill during the time that delivery of it was delayed, but not the loss sustained through the loss of the Government contract.
- (j) *A* having contracted with *B* to supply *B* with 1,000 tons of iron at 100 rupees a ton, to be delivered at a stated time, contracts with *C* for the purchase of 1,000 tons of iron at 80 rupees a ton, telling *C* that he does so for the purpose of performing his contract with *B*. *C* fails to perform his contract with

A, who cannot procure other iron, and *B* in consequence, rescinds the contract. *C* must pay to *A* 20,000 rupees, being the profit which *A* would have made by the performance of his contract with *B*.

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Contract Act.
section 78.

- (*k*) *A* contracts with *B* to make and deliver to *B* by a fixed day, for a specified price, a certain piece of machinery. *A* does not deliver the piece of machinery at the time specified, and in consequence of this *B* is obliged to procure another at a higher price than that which he was to have paid to *A*, and is prevented from performing a contract which *B* had made with a third person at the time of his contract with *A* (but which had not been communicated to *A*), and is compelled to make compensation for breach of that contract. *A* must pay to *B*, by way of compensation, the difference between the contract price of the price of machinery and the sum paid by *B* for another, but not the sum paid by *B* to the third person by way of compensation.
- (*l*) *A*, a builder, contracts to erect and finish a house by the 1st of January, in order that *B* may give possession of it at that time to *C* to whom *B* has contracted to let it. *A* is informed of the contract between *B* and *C*. *A* builds the house so badly that, before the 1st of January, it falls down, and has to be rebuilt by *B*, who, in consequence, loses the rent which he was to have received from *C*, and is obliged to make compensation to *C* for the breach of contract. *A* must make compensation to *B* for the cost of rebuilding the house, for the rent lost, and for the compensation made to *C*.
- (*m*) *A* sells certain merchandise to *B*, warranting it to be of a particular quality, and *B*, in reliance upon this warranty, sells it to *C* with a similar warranty. The goods prove to be not according to the

§ 652.
Contract Act,
section 73.

warranty, and *B* becomes liable to pay *C* a sum of money by way of compensation. *B* is entitled to be reimbursed this sum by *A*.

- (*n*) *A* contracts to pay a sum of money to *B* on a day specified. *A* does not pay the money on that day. *B*, in consequence of not receiving the money on that day, is unable to pay his debts, and is totally ruined. *A* is not liable to make good to *B* anything except the principal sum he contracted to pay, together with interest up to the day of payment.
- (*o*) *A* contracts to deliver 50 maunds of saltpetre to *B* on the 1st of January, at a certain price. *B*, afterwards, before the 1st of January, contracts to sell the saltpetre to *C* at a price higher than the market rate of the 1st of January. *A* breaks his promise. In estimating the compensation payable by *A* to *B*, the market price of the 1st of January, and not the profit which would have arisen to *B* from the sale to *C*, is to be taken into account.
- (*p*) *A* contracts to sell and deliver 500 bales of cotton to *B* on a fixed date. *A* knows nothing of *B*'s mode of conducting his business. *A* breaks his promise, and *B*, having no cotton, is obliged to close his mill. *A* is not responsible to *B* for the loss caused to *B* by the closing of the mills.
- (*q*) *A* contracts to sell and deliver to *B*, on the 1st of January, certain cloth which *B* intends to manufacture into caps of a particular kind, for which there is no demand, except at that season. The cloth is not delivered till after the appointed time, and too late to be used that year in making caps. *B* is entitled to recover from *A*, by way of compensation, the difference between the contract price of the cloth and its market price at the time of delivery, but not the profits which he expected to obtain by

making caps, nor the expenses which he has been put to in making preparation for the manufacture. § 652.

Contract Act,
section 73.

(1) *A*, a ship owner, contracts with *B* to convey him from Calcutta to Sydney in *A*'s ship, sailing on the 1st of January, and *B* pays to *A*, by way of deposit, one-half of his passage money. The ship does not sail on the 1st of January, and *B*, after being, in consequence, detained in Calcutta for some time, and thereby put to some expense, proceeds to Sydney in another vessel, and, in consequence, arriving too late in Sydney, loses a sum of money. *A* is liable to repay to *B* his deposit, with interest, and the expense to which he is put by his detention in Calcutta, and the excess, if any, of the passage money paid for the second ship over that agreed upon for the first, but not the sum of money which *B* lost by arriving in Sydney too late.

There are two classes of damages—general and special. General damages.

General damages have been defined in England as such as the law will presume to be the direct natural or probable consequence of the act complained of.¹ In the case of a breach of contract they must be the natural result or just consequence fairly attributable to the breach itself,² that is arising, according to the usual course of things including reasonable human conduct,³ from the breach.

Human
conduct.

It has been said⁴ that natural consequence means such a result as must follow from the defendant's act in the ordinary course of nature; in short, a consequence which

Natural.

¹ *Ströms v. Hutchison*, (1905) A. C. 515 H. L. Sc.

² *Lepla v. Rogers*, (1898) 1 Q. B. 31; *Bramwell* L. J. said in *MacMahon v. Field*, (1881) 7 Q. B. D. 591, that the breach need not directly cause the damage, if it was the only event without which it could not have happened.

³ *Wilson v. Northampton & Banbury Ry.*, (1874) L. R. 9 Ch. 285; *Hobbs v. L. & S.W. Ry.*, (1875) L. R. 10 Q. B. 111; *The City of Lincoln*, (1880) 15 P. D. 15; *The Argentino*, (1889) 14 A. C. p. 523.

⁴ *Encyclo. of Laws* Vol. 4 p. 97.

§ 652.
Probable.

is physically necessary.¹ Whereas a probable consequence is such as human nature, being what it is, usually follows from such an act as the defendant's, or so frequently follows, that a person of ordinary intelligence and foresight would reasonably anticipate such a result.

It seems that both classes are included under the Contract Act as general damages, and this is certainly so² in England.³

Arising from
act of
promisee.
Need not be
pleaded.

Such damages are not recoverable if they arise from the act of promisee.⁴

Unlike special damages, general damages⁵ need not be specially pleaded.⁶

What
damage is
presumed.

But when it is said that the law presumes general damages, that does not mean that no evidence need be given of the amount if substantial damages are claimed,⁷ for if the plaintiff proves a breach of contract and no more, the law only presumes that nominal damages have been sustained.⁸ But this result does not follow where circumstances are proved which show that there was substantial damage, although no loss of any specific sum,⁹ or, in fact, no evidence at all of the quantum of loss is given.¹⁰

¹ In *MacMahon v. Field*, (1881) 7 Q. B. D. 591, *Brett L.J.* divided damages into necessary consequences, probable consequences, and consequences within the contemplation of the parties, and held that if probable they must be within the contemplation of the parties.

² *Ströms v. Hutchison*, (1905) A. C. 515 H. L. Sc.

³ See *Hammond v. Bussey*, 20 Q.B.D. 79, "the damage need not be the inevitable result of the circumstances, but must be the probable result"; *Lepia v. Rogers*, (1893) 1 Q.B. p. 37.

⁴ *Jones v. Gardiner*, (1902) 1 Ch. 191; *MacMahon v. Field*,

(1881) 7 Q. B. D. p. 595.

⁵ *Ratcliffe v. Evans*, (1892) 2 Q. B. 524, 528; *Bodley v. Reynolds*, (1846) 8 Q. B. 779; *Ströms v. Hutchison*, (1905) A. C. 515.

⁶ *Boorman v. Nash*, (1829) 9 B. & C. 145; *Smith v. Thomas*, (1835) 2 Bing. N. C. 372.

⁷ As stated in *Encyclo. of Laws* Vol. 4 p. 103.

⁸ *Rayner v. Rederiaktiebolaget*, (1895) 2 Q. B. 289 and *see* p. 670; *Ranchhod Bhawan v. Manmohandas*, (1907) 32 B. 165; *The Bodlewell*, (1907) P. p. 296.

⁹ *The Greta Holme*, (1897) A.C. p. 604 H. L.

¹⁰ *O'Hanlan v. G. W. Ry.*, (1865) 34 L. J. Q. B. 154.

The onus of proving that he has suffered substantial damage lies on the plaintiff.¹ He is entitled to the benefit of such presumptions as according to the rules of law are made against persons² who are wrongdoers³ in the sense of refusing to perform and not performing their agreement. It is an established maxim that every reasonable presumption may be made as to the benefit which he might have obtained by the *bonâ fide* performance of the contract.⁴ But in a suit for goods sold against a defendant who has been guilty of no fraud or improper conduct, in the absence of evidence of quality, the presumption is that they were of the cheapest description.⁵ Damages may be based on probabilities, which must be a matter of speculation, but totally problematical damages cannot be recovered.⁶ The Court cannot make a shot⁶ or guess⁷ without any legal basis of assessment.⁶ It was held by the House

§ 652.
Onus of proving substantial damage. Presumptions.

Probabilities.

Not guesses.

¹ *Woodroffe* on 'Evidence' 4th Ed. 536.

² *Wilson v. Northhampton & Banbury Ry. Co.*, (1874) 43 L. J. Ch. 505 C. A., L. R. 9 Ch. 285, where damages were given for a breach of contract to build a station on the plaintiff's land instead of specific performance, the principle of assessment is however the same as in contracts generally; see Specific Relief Act s. 19 and Fry Specific Performance 6th Ed. p. 637; *Rock Portland Cement Co. v. Wilson*, 31 W. R. 193 (Eng).

³ The principle of *Armory v. Delamirie*, (1722) 1 Sm. L.C. 11th Ed. 356, was, it was held, to be reasonably applied according to the circumstances, though the analogy was not to be followed to

the letter. But presumptions even in *odium spoliatoris*, have known reasonable limits. They must not be conjectures nor grounded on data which the evidence itself shows to be inexact: *Shah Makhantal v. Srikrishna Singh* 12 Moo. I. A. p. 198; *Venayak v. Collector of Bombay*, (1901) 26 B. p. 51.

⁴ *Wilson v. Northhampton & Banbury Ry. Co.*, (1874) 43 L. J. Ch. 505 C. A., L. R. 9 Ch. 285.

⁵ *Clunnes v. Pezzery*, (1807) 1 Camp. 7.

⁶ *Sapwell v. Bass*, (1910) 2 K.B. 486.

⁷ *Erie County v. Carroll*, (1911) A.C. 105; the Court will not proceed on "guess or surmise."

§ 652. of Lords that the data for estimating the amount of substantial damages are not precise.¹ There is no need to prove the loss of any specific sum,² where the loss is tangible. The elements may be of a more or less indefinite character.³ The fact that no evidence is⁴ or can very well be given is no reason for not awarding damages where it is obvious some loss has been suffered.⁵

Need not be precise.

A jury is not bound to ascertain absolutely and with mathematical nicety the precise amount of damage sustained, but looking at the reasonable probabilities of the case, it must compensate the plaintiff as far as it can for the loss he has suffered naturally arising out of the breach.⁶

Difficult of determining.

Where the total amount cannot be exactly fixed because the goods have been lost and the quantity is not definitely known, the jury must make a reasonable estimate.⁷

Market rate.
Inferiority.

Proof that the market value was not less than a certain price is enough.⁸ Inferiority must also be proved in an action for breach of warranty.⁹ The Court frequently

¹ *The Greta Holme*, (1897) A. C. p. 604, followed in *Mersey Dock & Harbour Board v. S.S. Marfessa*, (1907) A. C. p. 245 H. L.

² *Ibid.* p. 602; Lord Morris dissented and said some reasonable proof of actual loss sustained was necessary. He said the amount of damage for loss of use was the merest guess where a dredger not used for profit was injured. Cf. *Hamlin v. G. N. Ry.*, (1856) 26 L. J. Ex. 20, "no damages in general can be recovered that are incapable of being specifically stated and appreciated with certainty."

³ *Wilson v. Northampton & Banbury Ry. Co.*, (1874) 43 L. J. Ch. 505 C. A., L. R. 9 Ch. 285.

⁴ *O'Hanlan v. G. W. Ry.*, (1865) 34 L. J. Q. B. 154, *per* Miller J.

⁵ *Ibid.* *per* Blackburn J. referring to importer's average profits which were held to be general damages.

⁶ *Hooper v. Hertz*, (1906) 1 Ch. 549, 560-2.

⁷ *Martineau v. Kitching*, (1872) L. R. 7 Q. B. p. 456, 41 L. J. Q. B. 227; *Castle v. Playford*, (1872) L. R. 7 Ex. p. 99, 100.

⁸ *Shridhan v. Girdhandas*, 26 B. p. 289. (In a claim for the difference between the market rate and the contract price, such must be alleged and proved.)

⁹ *Wertheim v. Chicoutimi*, (1911) A. C. p. 316. (A claim for deficiency in weight or quality disallowed as the evidence was loose and unsatisfactory.)

refers the question of the amount of damages to the master, and generally reserves the costs,¹ but unless some such arrangement is made the plaintiff must prove the damages in Court, § 652.

Special damages are such as the law will not infer from the nature of the act. They do not follow in ordinary course. They are exceptional in their character,² and therefore they must be claimed specially and proved strictly.³ Special. Proof.

In cases of contract special or exceptional damages cannot be claimed unless such damages are within the contemplation⁴ of the defendant at the time of the contract⁵; such damages must be the probable consequence of the breach as defined above.⁶ It makes no difference whether a claim for general damages is made and shown to cover a special loss, or whether a claim is made for special damages and the special loss is shown to be covered by an award of general damages.³

Though the only actual damage is special and cannot be recovered as the defendant had no knowledge of its probability, still the plaintiff can recover what would have been the general damages though not suffered.⁶ General damages given, where special not recoverable.

¹ See *British Marine and Foreign Ins. Co. v. I. G. N. and Ry. Co.*, (1910) 15 C. W. N. 226, when a reference as to damages was allowed on appeal. But the plaintiff cannot ask for a reference as to general damages without amendment in a suit on a resale: *M. S. E. Angullia v. Sassoon*, (1912) 16 C. W. N. 593.

² The decisions on special damages show what the law regards as remote or improbable damages, but all such are recoverable if known to be a likely result of the breach at the time of making the contract. For the statement of the rule as to what consequences are within the

knowledge of the defendant see p. 665, under Remote Damages.

³ *Ströms v. Hutchison*, (1905) A. C. 515 H. L. Sc.

⁴ Under 73 they must be known to the party sought to be charged.

⁵ Page 658 *ante* under General Damages.

⁶ *Cory v. Thames Iron Works*, (1868) L. R. 3 Q. B. 181. So in *Boisogomoff v. Nahapiet*, (1902) 29 C. 823, it was held that on proof of inferiority, the buyer could recover the difference in value without accounting for the actual use to which the goods were put.

§ 652.
Rule as to
Special
Damages.

The rule as to what is termed Special Damages depends upon the party's knowledge at the time he made the contract that the loss or damage was likely to result from a breach of the contract.

Compared
with English
rule.

This is not identical with the rule in *Hadley v. Baxendale*¹, for there the damage "such as might reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it" was held to be recoverable, but probably no distinction was intended to be made.²

The illustrations (i), (j), ³ (k), (l), (o), (p), (q), (r), seem to show that knowledge of the circumstances which made the damage probable is sufficient. Illustration (q) seems to show that ordinary commercial knowledge of a trade is assumed to exist in the case of a dealer in that trade.⁴ Illustrations, however, are no sure guides in construing Indian Acts.

Knowledge.

The section requires knowledge, not the probable knowledge of a reasonable man,⁵ and this shows that the principle of the English cases requiring express knowledge of exceptional damage applies in India.⁶

¹ (1854) 9 Ex. 341.

² Mookerjee J. cited the rules in *Hadley v. Baxendale* as entirely applicable to India; *Daswant Singh v. Syed Shah*, (1907) 6 C.L. J. 398.

³ Presumably the amount of profit on the resale was probable, at any rate in England any exceptional profit is not recoverable unless known to the seller: *Horne v. M. Ry.*, (1873) L. R. 8 C. P. 131; for to render the seller liable the sub-contract must be fully known to him, *Grébert Borgnis v. Nugent*, (1885) Q. B. D. p. 90 and penalties for late delivery under a sub-sale are not recoverable unless known to the

seller: *Hydraulic Engineering Co. v. McHattie*, (1878) 4 Q. B. D. 670. The same observations apply to the amount of the rent recoverable in illustration (f). It seems that without knowledge of the facts, only ordinary rent and not some extravagant rent agreed to be paid by a rajah for a few months of the season, is recoverable.

⁴ Cf. *Schulze v. G. E. Ry.*, (1887) 19 Q. B. D. 30.

⁵ That is, it is a question of fact; see per Lord Esher in *Hammond v. Bussey*, (1887) 20 Q. B. D. 79; but it seems that a man is deemed to know what a reasonable man would have known.

The onus of proving knowledge is on the plaintiff, and it seems actual knowledge must be proved, though doubtless a man will be presumed to know what a reasonable man applying his mind to the circumstances would know.

§ 652.
Onus of proving.

The knowledge must be of the damage. This was the view taken in *Hadley v. Baxendale*,¹ but it has been said it is knowledge of the circumstances that render damage probable, that is required, not of the probable result of a possible breach.² It seems that if the special circumstances were known to the defendant and damage which would ordinarily follow from a breach of the contract in those circumstances, has ensued, such damage will be deemed to have been known to him and be recoverable.³ It seems clear that knowledge may be derived from verbal⁴ communications of the other party or in any other way, as from acquaintance with the conditions of any trade.⁵

Knowledge of the damage.

Knowledge of circumstances making damage probable sufficient.

It is therefore sufficient that the defendant was informed that a breach would result in a particular loss.⁶

It has been held that if goods are obviously useless for ordinary purposes, the seller is liable for damages on the basis of their value for the special purpose for which they were intended, although no notice was given to him of it.⁷

Goods useless for ordinary purposes.

¹ (1854) 9 Ex. 341.

² *Hamilton v. Magill*, (1888) 12 L.R. Ir. p. 202; *McMahon v. Field*, (1881) 7 Q. B. D. 591, 597.

³ *I. e.*, substantially what Mayne 7th. ed. 13, 31, considers to be the third rule in *Hadley v. Baxendale*.

⁴ *Sawdon v. Andrew*, (1874) 30 L. T. 23 (of resales).

⁵ See illus. (q) to s. 73.

⁶ This was held in England to be insufficient without notice of the special circumstances: *British Columbia Saw Mill v. Nettleship*, (1868) L. R. 3 C. P. p. 509.

⁷ *De Mattos v. G. E. Steamship Co.*, (1885) 1 Cal. & E. 489, per Stephen J., but this seems doubtful.

§ 652.
What
amounts to
knowledge.

What constitutes sufficient notice of exceptional circumstances depends on the facts of each individual case.¹

Where carriers did not know of a resale, it was held that they must have known that there probably was or would be one with a limited time for delivery.²

Samples.

If goods are intended to be used as samples, the defendant is not liable for damages in respect of the intended use without notice.³ Attaching a label marked "traveller's goods, deliver immediately" is not sufficient notice to a carrier of the intended use as samples, so as to make him liable for a traveller's loss of time owing to late delivery.⁴ Where there is notice, damages for loss of season owing to late delivery have been given.⁵

Resales.

Liability is incurred in respect of so much of the terms of a sub-sale as are disclosed⁶ save that a carrier is presumed to know that there is a time limit for delivery⁷ and that an importer makes average profits.⁷

Too remote.

The rule as to remoteness of damages is vague⁸ and is a matter of law.⁹

¹ *Jameson v. M. Ry.*, (1884) 50 L. T. 426; *Simpson v. L. & N. W. Ry.*, (1876) 1 Q.B.D. 274. (The fact that goods are addressed to a show ground, is notice that they are intended for exhibition). Notice that Admiralty contracts were out and bill of lading must be delivered by December 31st, was held sufficient notice of a contract with the Admiralty: *Prior v. Wilson*, (1860) 1 L. T. 549; *Dunn v. Bucknall*, (1902) 2 K. B. 614.

² *Ströms v. Hutchinson*, (1905) A. C. 515 H. L. Sc.

³ *G. W. Ry. v. Redmayne*, (1866) L. R. 1 C. P. 329; *Woodger v. G. W. Ry.*, (1867) L. R. 2 C. P. 318.

⁴ *Candy v. M. Ry.*, (1878) 38 L. T. 226.

⁵ *Schulze v. G.E.R.*, (1887) 19 Q.

B.D. 30; *Simpson v. L. & N. W. Ry.* (1876) 1 Q.B.D. 274; see *Madras Ry. v. Govinda Rau*, (1898) 21 M. 172, where there was no notice.

⁶ *Prior v. Wilson*, (1860) 1 L. T. 549; *Borries v. Hutchinson*, (1865) 18 C.B.N.S. 445; *Elbinger v. Armstrong*, (1874) L.R. 9 Q.B. 473; *Grébert Borgnis v. Nugent*, (1885) 15 Q. B. D. 85.

⁷ *O'Hanlan v. G. W. Ry.*, (1865) 34 L. J. Q. B. 154.

⁸ *Hobbs v. L. & S. W. Ry.*, (1875) L. R. 10 Q. B. 121 (the decision in which was doubted in *MacMahon v. Field*, (1881) 7 Q. B.D. 591); *De La Bere v. Pearson*, (1908) 1 K. B. 280.

⁹ *Hadley v. Baxendale*, (1854) 9 Ex. 354; *MacMahon v. Field* (1881) 7 Q.B.D. 591, per Brett L.

To recover damages it is not enough that the defendant's breach of contract has in fact produced such damages unless it can be reasonably presumed that he, when he entered into the contract, either knew or ought to have known¹ that they would ensue: and it will be deemed that he ought to have known wherever a reasonable man placed as he was and knowing what he knew and no more, would have recognised that they were a necessary or probable result of such a breach.²

§ 652.
Too remote.

The cases on special damages illustrate the question of remoteness, for without knowledge thereof at the time of contracting all special damage is too remote, and with such notice no damage is too remote.

It has been said that, even if a seller knew that the goods were to be sold to buyers from his buyer's sub-buyers, damages on such a resale could not be recovered against him.³ This has been doubted in England,⁴ and is not the rule under section 73, for if he had knowledge of it, the seller would be responsible for damages.

Sub-sub-sale.

In assessing damages where special or general compensation for actual loss is the controlling principle,⁵ and no regard is had to the motives which induce the violation

Rules for
assessing
damages.
Actual loss
only.

¹ This seems to be so in India: the principle that a man has notice of a fact, if a reasonable man applying his mind to the circumstances must have known it, is universal in commercial matters.

² This passage is taken from the *Encyclopædia of English Laws*, vol. 4 p. 106; see *Dawson v. Bingley Urban District Council*, (1911) 2 K. B. 149 (increased damage by fire owing to mis-

placed fire plug—recoverable).

³ *Borries v. Hutchinson*, (1865) 18 C. B. N. S. 445.

⁴ Per Bowen L. J. in *Grébert-Borgnis v. Nugent*, (1885) 15 Q.B. D. p. 94; Benj. 5th Ed. 985 supports *Borries'* case.

⁵ *Sedgwick on Damages*, 4th Ed. 255; *Wertheim v. Chicoutimi*, (1911) A. C. 801; *Erie County v. Carroll*, (1911) A. C. 105.

§ 652. of the agreement.¹ For whether the failure to perform is owing to misfortune² or to deliberate intention¹ the measure of damages is the same.

Loss of
reputation.

In England for a breach of contract the only damages recoverable are such as are the natural and probable results of the breach,³ and not any loss of reputation⁴ to party owing to the circumstances of the breach.⁵ But there does not seem to be any such limitation under section 73.³

¹ *Ibid.* p. 233. *Contra* Chitty on Contracts, p. 684, citing *Soudes v. Fletcher*, (1822) 5 B. & Ald. 835, repeated in 15th Ed. p. 827; but s. 73 does not allow of any such doctrines. The H. of L. said that where a carrier for his own convenience disregarded his contract, the Court would not be astute to defeat an honest claim for damages: *Ströms v. Hutchison*, (1905) A. C. 413 (*quære* whether the Court ever should be). The principle cited from Chitty was also applied in *Ranchhod v. Manmohandas*, 9 Bom. L. R. 1087, 32 B. 165; cf. *Jones v. Gardiner*, (1902) 1 Ch. p. 195; *Day v. Singleton*, (1899) 2 Ch. 320; *contra* *Muhammad Mohsin Khan v. Turab Ali*, (1909) 6 A. L. J. 441, and the doctrine in England has been repudiated by the H. L. in *Addis v. Gramophone Co.*, (1909) A. C. 498, as regards contracts; but it was said that if the circumstances amounted to a tort a separate cause of action arose; but otherwise in a suit for breach of contract the circumstances of the breach however exasperating do not affect the damages.

² See *Measures v. Measures Bros.*, (1910) 2 Ch. 248 "Misfortune is no defence unless it is so by the contract."

³ *Addis v. Gramophone Co.*, (1909) A. C. 488 H. L. (where in a suit for wrongful dismissal, no damages were allowed for loss of reputation or increased difficulty in obtaining other employment owing to the special circumstances: such might be

recovered in an action in tort). But see *Purshotamdas v. P.*, (1896) 21 B. 23, following *Umed Kika's* case 7 Bom. H. C. 122, where however the breach was of a promise to give in marriage which is anomalous in England: but s. 73 does not allow of anomalous cases, and the only limit is the knowledge of the defendant which certainly includes the fact that a breach of some contracts especially if committed in a particular way will result in loss of reputation. See p. 693 as to loss of customers.

* Cf. cases of failure to advance money, *Wallis v. Smith*, (1882) 21 Ch. D. p. 257, which are treated as anomalous in England: *Graham v. Campbell*, (1878) 7 Ch. D. p. 494. If the lender knew that such a result would probably ensue, it seems, he is liable in India.

⁵ *Addis v. Gramophone Co.*, *supra*. Collins L. J. dissented. Such damages are recoverable in tort, and it seems that in India whether there is a larger measure of damages in tort or not, that the only test in contract is, was the damage the natural and probable result of the breach to the knowledge of the defendant. It seems impossible to limit this to damages resulting from a simple failure to perform, when the breach was intentionally committed with a deliberate desire to injure the plaintiff. However the difficulty is met by claiming for breach of contract and for any tort.

In England damages for injury to feelings have no place in an ordinary action of contract, save in actions for breach of promise to marry.¹ But section 73 expresses no exception to the ordinary law as to damages, and such damages if they arise, it seems, can be recovered for breach of any contract.²

§ 652.

Loss of reputation.
Injury to feelings.

The damages are the loss to the plaintiff, not the cost of performance to the defendant,³ or to the plaintiff.⁴

Where the seller fails to deliver goods which he has contracted to deliver⁵ in a suit for non-delivery,⁶ the measure of damages is *primâ facie*⁷ the difference, if any, between the true value of the goods to the purchaser⁸ which is *primâ facie* the market rate, if any, and the contract rate on the due date of performance.⁹ In such a case the price at which the purchaser in anticipation of delivery resold the goods is, where no question of profit arises, an entirely irrelevant matter.¹⁰ The due date is the last day for performance,¹¹ and this is so, although the seller has the option to deliver in August or September and repudiates the contract in August,¹² for

Non-delivery.

Due date.

¹ *Hamlin v. G. N. Ry.*, (1856) 26 L. J. Ex. 20.

² *Ranchhod Bhawan v. Manmohandas*, (1907) 32 B. 165.

³ *Re Chiffereil*, (1888) 40 Ch. D. 45.

⁴ *Wigzell v. School for Indigent Blind*, (1882) 8 Q. B. D. 357, 364, save where he is entitled to supply himself with goods which the defendant has failed to deliver: see p. 675.

⁵ The buyer's right to delivery may depend on a contingency and if that does not occur, neither party has any rights.

⁶ As to cases where specific

performance can be obtained, see § 118.

⁷ *I.e.*, the general damages.

⁸ *Wertheim v. Chicoutimi*, (1911) A. C. p. 309.

⁹ *Durga Prosad Sureka v. Bhagan*, 31 C. 614, 620 P. C

¹⁰ *Wertheim v. Chicoutimi*, supra, citing *Rodocanachi v. Milburn*, (1886) 18 Q. B. D. 67.

¹¹ See as to the due date § § 326, 327.

¹² *Mackertich v. Noho Coomay*, (1908) 80 C. 477, for the damages when delivery is to be as required, see *Jones v. Gibbons*, (1853) 8 Ex. 920.

§ 652. the seller cannot change the due date by giving notice that he will not deliver.¹

Where due date does not apply.

But the due date under the contract for delivery is not always the date at which damages are assessed.

Where no time fixed for performance.

If no date is fixed by the contract, performance is due at a reasonable time from the date of the contract, but if the seller gives notice that he will not deliver, the date of the receipt of such notice is the date for calculating the damages.²

Notice that no delivery will be given.

Postponed performance.

If the date of performance is postponed by agreement, which must be a binding one,³ or at the request of the seller,⁴ the date for assessing damages is the postponed date. If the forbearance is at the vendor's request and for his convenience, and no time is fixed, the damages are calculated at the date of the withdrawal of the forbearance,⁵ but the promisee cannot extend the time for performance without the consent of the promisor with a view to claim heavier damages.⁶ The onus of proving that there has been a binding agreement to postpone the due date is on the party asserting it⁵ and he must plead such postponement.⁷

Onus of proving postponement.

¹ Cf. *Ripley v. McClure*, (1849) 4 Ex. 345 (a buyer giving notice of unwillingness, to accept) as to the duty to mitigate damages on receipt of such a notice, see *infra*. The same rule applies to instalment contracts : *Cooverjee Bhoja v. R. N. Mookerjee*, 36 C. 617 C. A.

² Section 73 illus. (c).

³ *Jugmohandas v. Nusserwanji*, (1902) 26 B. 744; see *Wertheim v. Chicoutimi*, (1911) A. C. p. 315, where the postponed delivery accepted without prejudice to the buyer's rights was held not to be a new contract, but the old one revived.

⁴ *Ogle v. Vane*, (1868) L. R. 10 Ex. 195 L. R. 3 Q. B. 272; *Hickman v. Haynes*, (1875) L. R. 10 C. P. 598.

⁵ *Re Schwabacher*, (1909) A. C. 293. It is not enough to show that both parties did not intend to act on the strict terms of the contract, but he must show that definite terms were agreed upon as to what was substituted: *Darnley v. L. C. & D. Ry.*, (1867) L. R. 2 H. L. 43.

⁶ *Muttaya Manigaran v. Lekku Reddiar*, (1912) 11 M. L. T. 301.

⁷ *M. S. E. Angullia v. Sasson*, (1912) 16 C. W. N. 593.

If the goods have been paid for and the seller fails to deliver, the buyer is entitled to a reasonable time after the breach of contract to prepare to purchase other goods, and the date for assessing damages is a reasonable time after the breach.¹ When price paid.

But in England measure of the damages has been held to be the value of the goods at the date of the trial.² The English cases are not very clear on the point.³

According to Leake the damages are the full market value whether the price has been paid in cash or by bill, but if the bill is dishonoured the difference between the market and contract price is recoverable, unless payment is a condition precedent or concurrent with the right to receive delivery, in either of which cases the buyer cannot sue for damages.⁴ Paid by bill.

If stock has been paid for and the seller fails to deliver in England, the measure of damage is the value at the time of the trial,⁵ though it has been said to be the full market price on the due date and interest on the money paid,⁶ and also to be the highest price of the stock between the day of the breach and the day of trial if there is no undue delay in suing.⁷ This principle is only applied where Failure to deliver shares.

¹ *Shaw v. Bill*, 8 M. 38.

² *Elliot v. Hughes*, (1863) 3 F. & F. 387, *Laws of Eng.* Vol. 10 p. 384; *Mayne* 8th Ed. (1909) p. 223, 226, says it is the value at the date of the breach, except in the case of stock which is to be valued at the date of the trial.

³ *Dutch v. Warren*, 2 Burr. 1610, but see *Owen v. Routh*, (1854) 14 C.B. 327. In *Startup v. Cortazzi*, (1835) 2 C.M. & R. 165, the price with interest had been refunded.

⁴ 6 Ed. 777; *Valpy v. Oakeley*, (1857) 16 Q. B. 941; *Griffiths v.*

Perry, (1859) 1 E. & E. 690.

⁵ *Elliot v. Hughes*, (1863) 3 F. & F. 387, not the highest price attained up to the trial; cf. cases of failure to replace stock: *M'Arthur v. Seaforth*, (1810) 2 Taunt. 257; *Simmons v. London J. S. Bank*, (1891) 1 Ch. 284 C.A., but see *Archer v. Williams*, (1846) 2 Car. & Ker. 26.

⁶ *Startup v. Cortazzi*, (1835) 2 C. M. & R. 165; *Barrow v. Arnaud*, (1846) 8 Q. B. p. 610.

⁷ *Owen v. Routh*, 14 Ch. D. 387; *Shaw v. Holland*, (1846) 15 M. & W. 138, but see cases cited in note 6, *supra*.

§ 652. there is a continuous obligation to restore property or funds.¹

C. I. F. Where a seller under a C. I. F. contract failed to perform his contract by shipping a wrong quantity, it was held that the buyer could recover damages for non-delivery, but not the insurance money recovered by the sellers on a loss. Even if the property had passed and the contract been performed, the buyer could not recover on a profit policy obtained by the seller for his own benefit.²

Actual loss. The damages are only the actual loss suffered³ by a party who has acted in a reasonable manner,⁴ which may be less than the natural and probable damage.⁵ Damages are intended as an indemnity only.³

Nominal. If no loss is suffered, only nominal damages can be recovered⁶; for a breach of contract imports some damage, and the plaintiff may recover compensation for trouble and expense incurred in supplying himself with that which the defendant ought to have supplied.⁷ In England, if only nominal damages are recovered under the present practice, the Court may give the defendant his costs.⁸

¹ *Michael v. Hart*, (1902) 1 K.B. 482, where Wills J. gave the highest rate between the due date and the breach, the point was undecided in appeal, and not argued before the H. of L., 89 L. T. 422.

² *Harland & Wolff v. Barstall*, (1901) 6 Com. Cas. 113; 84 L. T. 324, 17 T. L. R. 338.

³ *Wertheim v. Chicoutimi*, (1911) A. C. 301; *Erie County v. Carroll*, (1911) A. C. 105 (where no loss was proved).

⁴ *Jugmohandas v. Nusserwanji*, (1902) 26 B. p. 749; *Dunkirk Colliery v. Lever*, (1878) 9 Ch. D. p. 25.

⁵ *Wigsell v. School for Indigent Blind*, (1882) 8 Q. B. D. 357; *Valpy v. Oakley*, (1851) 16 Q. B.

941; *Griffiths v. Perry*, (1859) 1 E. & E. 680.

⁶ *Griffiths v. Perry*, (1859) 1 E. & E. 680 (buyer suffering no loss); *Valpy v. Oakley* supra (no difference between market and contract rate); *Prehn v. Royal Bank of Liverpool*, (1870) L.R. 5 Ex. p. 99, cf. *Salvesen v. Reid*, (1905) A. C. 302.

⁷ Section 73, illus. (b). *quare* whether this illustration was intended to show that nominal damages are not allowable.

⁸ Leake, 6th Ed. 648; *Harris v. Petherick*, (1879) 4 Q. B. D. 611; *Dicks v. Brooks*, (1880) 15 Ch. D. 22; *Sprange v. Lee*, (1908) 1 Ch. 424; *Saywell v. Bass*, (1910) 2 K. B. 486.

No suit lies for nominal damages, if the defendant has paid all that is due.¹ § 652. Nominal.

The same principles apply to non-delivery of shares as to non-delivery of goods.² Shares.

But for the non-delivery of a ship to be built or repaired *prima facie* the damages are the loss of ordinary profits owing to delay in delivery.³ Ships. The same rule applies in the case of delay in delivering a machine.⁴ But unless there is notice of exceptional circumstances only what would have been the ordinary profits are recoverable, not profits that would have been made from a novel use of the article ; but though not intended or used for ordinary purposes, the buyer can recover what would have been the profits from ordinary use.⁵

It has been held that the market value means the price to an ordinary customer,⁶ and the fact that the seller can obtain the goods under a collateral contract below the market rate, is no reason for adopting any but the market rate.⁷ Market value.

¹ *Beaumont v. Greathead*, (1846) 2 C. B. 494.

² *Shaw v. Holland*, (1846) 15 M. & W. 186; *Tempest v. Kilner*, (1846) 3 C. B. p. 253; but see *Pott v. Flather*, (1847) 16 L. J. Q. B. 366, where it was said the difference was between the contract price and the market rate on the due date or the earliest day afterwards on which the share could be sold.

³ *Schiller v. Finlay*, 8 B. L. R. 544; *Fletcher v. Tayleur*, (1855) 17 C.B. 21; *The Argentino*, (1889) 14 A.C. 519; *Fitzgerald v. Leonard*, (1892) 32 L. R. Ir. 675; *Welch v. Anderson*, (1892) 41 L. J. Q. B. 167; *Re Trent and Humber Co.*, (1868) 4 Ch. Ap. 112 (delay in repairing).

⁴ *Smeed v. Ford*, (1859) 1 E. & E. 602; cf. *Portman v. Middleton*, (1858) 4 C. B. N. S. 322, where a loss on resale unnotified was disallowed, but why ordinary damages were not given is not

clear ; see too *British Columbia Sawmill v. Nettleship*, (1868) L. R. 3 C. P. 499, to which a similar remark applies, but both were cases of failure to deliver part of a machine.

⁵ *Cory v. Thames Ironworks Co.*, (1868) L. R. 3 Q. B. 181; cf. *De Mattos v. G. E. Steamship Co.*, (1885) Cal. & E. 489.

⁶ *Orchard v. Simpson*, 2 C. B. N. S. 299.

⁷ *Cohen v. Cassim Nana*, (1876) 1 C. 244 C. A., citing *Barrow v. Arnaud*, 8 Q.B. 605, distinguishing *Cort v. The Ambergate Ry*, 20 L. J. Q. B. 460. The same principle of not compelling the buyer to account for his dealings with inferior goods, was approved in *Boisogomoff v. Nahapiet*, (1902) 29 C. 828, cf. *British Westinghouse Co. v. Underground E. Ry.*, (1911) 1 K.B. 575, but see *ibid.* p. 587, affirmed in C.A. (1911) 81 L. J. K. B. 473.

§ 652.
Actual loss
only.

But having regard to the wording of section 73 and recent rulings of the Privy Council¹ that the buyer can only recover his actual loss, these cases are not good law. The last English case,² which is later than the Privy Council cases, is, it seems, unsound.³

Market rate.

The market rate is the rate at the time and place agreed upon,⁴ and the full market rate is the true measure, although since the sale the value of the goods has been enhanced by the discovery of a special quality in them unknown before.⁵ In America if a higher price must be paid in the market for buying at short notice, this must be taken into consideration.⁶

Increased
price for
prompt
delivery.

It has been held in England that no consideration is to be given to the fact that the buyer gave an increased price for prompt delivery.⁷ But that decision is a dubious one. There goods were delivered late; the seller had recovered by suit the whole contract price, and the buyer sued to recover part of it on the ground that he paid that part for prompt delivery on the due date, and that the market value was by that sum less than the contract rate. The evidence was rejected by some Judges as being

¹ *Erie County Co. v. Carroll*, (1911) A. C. 105; *Wertheim v. Chicoutimi*, (1911) A. C. 301.

² *British Westinghouse Co. v. Underground E. Ry.*, *supra*.

³ But Jenkins, C. J., gave a plaintiff an opportunity of proving that rates at which he settled certain contracts were less than the market rate because of his customer's generous feelings towards himself; *Jugmohandas v. Nusserwanji*, (1902) 26 B. p. 748. The suit was for non-delivery of coal, for which there was no market rate. The damages were assessed at the difference between the contract price and the

rates at which the buyer, the plaintiff, had settled contracts to deliver similar coals. The C. J. gave the plaintiff an opportunity during the appeal to show that these rates were less than the market rate to an ordinary customer.

⁴ *Michael v. Hart*, (1902) 1 K. B. 482. The same rule applies in America: Page on Contracts s. 1589.

⁵ *Josling v. Irvinc*, (1861) 30 L. J. Ex. 78.

⁶ *Christopher v Yeager*, 67 N. E. 166.

⁷ *Brady v. Oastler*, (1864) 3 H. & C. 112, Martin J. dissenting.

contrary to the written contract, though had the contract set out the facts they said, the sum would have been recoverable as the consideration had failed : Bramwell B. said it did not vary the contract, but that the consideration given for the contract was immaterial. Benjamin suggests that the sum was recoverable for total failure of one part of the consideration.¹ It seems that the real damage was the difference in value to the purchaser on the due date and on the date when delivered, and this could be shown in the ordinary way.

The market rate is nothing more than a compilation of the result of various facts connected with the trade on a particular day. To prove the rate it is better to rely on a record of rates made by a gentleman of experience and intelligence than to work out the rates.²

What is the market rate.

Obviously values created for a special purpose are irrelevant. Market price is to a great extent based on and made up of the views of those engaged in a particular business and familiar with its incidents. These views are based not only on transactions in which a man may himself have been actually engaged, but also on the general rumour and reputation in the market.³

The fact that a rate was fixed by the Bombay Cotton Association and sales settled at that rate, was not considered sufficient evidence of the market rate.⁴

Fixed by Association.

A rate fixed by a *Panchayat* is not binding,⁵ unless the custom of the trade is for prices to be so fixed, when its decision is binding unless shown to be fraudulent.⁶

By Panchayat.

The amount of damages given to a sub-buyer by a French Court for inferiority against a buyer were

By foreign Court.

¹ 5th Ed. 981, citing *Johnson v. J.*, (1802) 3 B. & P. 162.

² *Jugmohandas v. Nusserwanji*, (1901) 26 B. 744.

³ *Shridhan v. Gordhandas*, (1901) 26 B. 235.

⁴ *Ibid.*, the rate was fixed by

taking the rate of previous day and deducing that it had not fallen.

⁵ *Shriram v. Mudangopal*, (1908) 30 C. 865 P.C.

⁶ *Jehangirji v. Jaisingdas*, (1903) C. W. N. 57 P.C.

§ 652. considered as being presumably correct in an English Court in a suit by the buyer against his seller, the goods having been reasonably sold under the same warranty as given by the seller.¹

Where no
market rate.

Whether there be a market² rate or not the principle on which damages are to be assessed is exactly the same, *viz.*, the value of the goods at the date of the breach or breaches³ (*i.e.*, the due date).

But if there is no market rate the mode of estimating the value is different, but comes back to the elementary principle what were the goods worth at the time,³ that is, in a suit for non-delivery, worth to the buyer at the due date.⁴ In such a case more than nominal damages must be given.⁵ The value of the goods must be assessed as best it may,⁶ and the plaintiff must do his best and is entitled to recover his loss.⁷

If the market rate is uncertain then recourse must be had to such surrounding circumstances as affect the probabilities and among them the real prices produced about the time of due date.⁸

¹ *Hammond v. Bussey*, 20 Q.B.D. 79; *Grebert v. Nugent*, (1885) 15 Q.B.D. 85.

² For what amounts to an available market, see *Dunkirk Colliery v. Lever*, (1878) 9 Ch. D. p. 25.

³ *Jugmohandas v. Nusserwanji*, (1901) 26 B. 744.

⁴ *Stroud v. Austin*, (1883) Cal. & El. 119.

⁵ *Jugmohandas v. Nusserwanji*, (1901) 26 B. 744, citing *Elbinger v. Armstrong*, (1874) L. R. Q. B. 473; see too *Rama Bhandary v. Morgan*, (1909) 6 M. L. T. 294.

⁶ Where from the smallness of the place or the scarcity of the

commodity there is no higgling market to fix the value, the jury must assess it: *O'Hanlan v. G. W. Ry.*, (1865) 34, L. J. Q. B. 154, where an importer was allowed average importer's profits as general damages though he gave no evidence of the amount because he could not; the reason given was that importers do not import except for profit.

⁷ *Borries v. Hutchinson*, (1855) 18 C. B. N. S. 465; cf. *Schulze v. G.E.R.*, (1887) 19 Q.B.D. 30 C. A. (loss owing to delay in delivering samples).

⁸ *Shridhan v. Gordhandas*, (1901) 26 B. 235.

In a suit for non-acceptance if there is no market the seller can recover such an amount as would place him in the same position as if delivery had been accepted.¹

§ 652.

Where no market rate.

In the absence of a market rate in India damages were assessed at the difference between the contract rate and the rate in England, where there was a free market, less cost of carriage,² and the rates at which the plaintiff had settled similar contracts was taken as the basis of assessment³ on analogy with the English cases where a resale by the buyer has been taken as evidence of the then value of the goods,⁴ whether the resale was made at the time of the original contract without notice,⁴ or whether it was made subsequently to the contract.⁵ So in Ireland the price at which a buyer might have resold in the way of his trade was taken as evidence of the value of the goods.⁶

Where market in England.

Settlement of similar contracts.

Where similar goods are not available it is open to a buyer to procure the nearest substitute that he reasonably can and to charge the seller with the difference,⁷ though he must buy the cheapest possible,⁸ and it is open to the

Right to buy substitutes.

¹ *Dunkirk Colliery v. Lever*, (1879) 41 L.J. Q.B. 633; *Cort v. Ambergate Ry.*, (1851) 20 L.J.Q.B. 460.

² *Cooverjee Bhogu v. Ragendra N. Mookerjee*, (1909) 36 C. 617 C.A; cf. *Wertheim v. Chicoutimi*, (1911) A.C. 801 80 L.J. C. P. 91 P.C.; cf. *O'Hanlan v. G. W. Ry.*, (1865) 6 B. & S. 484, 34 L.J. Q.B. 154. The same rule is applied in America where the market is within a reasonable distance: *Coxe v. Power*, 87 Minn. 56, Page on Contract s. 1589.

³ *Jugmohandas v. Nusserwanji*, (1901) 26 B. 744.

⁴ *Stroud v. Austin*, (1883) Cal. & El. 119; *France v. Gaudet*,

(1871) L. R. 6 Q. B. 199 (where there was no notice of resale).

⁵ *Grebert v. Nugent*, (1885) 15 Q.B.D. 85; cf. *Borries v. Hutchinson*, (1865) 18 C.B.N.S. 465.

⁶ *McNeill v. Richards*, (1899) 1 Ir. R. 79.

⁷ *Hinde v. Liddell*, (1875) L.R. 10 Q.B. 265, 268; *Hamlin v. G. W. Ry.*, 1 H. & N. 408; *Ströms v. Hutchinson*, (1905) A. C. 515 H. L. Sc.; *Erie County v. Carroll*, (1911) A. C. 105 P.C.

⁸ *British Westinghouse v. U. E. Ry.*, (1911) 81 L. J. K. B. 473, for he must act reasonably; *Le Blanche v. L. & N. W. Ry.*, (1876) 1 C. P. D. 286.

§ 652. seller to show that this is an erroneous measure of damages.¹

In America where no local market existed, the cost of getting similar goods elsewhere less the contract price has been adopted as the measure of damages.²

Buyer may
make the
goods
himself.

In order to procure the goods the buyer may, if that is a reasonable course, manufacture them himself,³ but then the difference between the cost of manufacture less the value of the machinery or the like used for the manufacturing after completion of the contract quantity, and the contract price is recoverable, but it must be strictly proved.⁴

May hire
substitute.

Further, if it is a reasonable thing to do, and in fact mitigates the seller's damages,⁵ he may hire chattels until he can supply himself with the chattel ordered, and charge the seller with such hire.⁶

Nearest date
on which a
market rate.

To take the nearest date on which there was a local market rate is not a correct method if other materials for assessment are available,⁷ but it is correct in the absence of other criteria.⁸

Contract to
manufacture.

If a contract to manufacture goods is repudiated, the seller may, without manufacturing the goods, recover from the buyer the difference between the cost of production

¹ *Jugomohandas v. Nusserwanji*, (1901) 26 B. 744.

² *MacFadden v. Henderson*, 128 Ala. 221.

³ It seems that this is never a necessary proceeding even if it would mitigate damages.

⁴ *Erie County v. Carroll*, (1911) A.C. 105 P.C. It is not the difference between what the goods would fetch when manufactured and the contract price.

⁵ See under Mitigating Damages p. 702 *British Westinghouse*

v. U. E. Ry., (1911) 81 L.J.K.B. 473 C.A.

⁶ *Mersey Docks and Harbour Board v. Owners of S.S. Marpessa*, (1907) A.C. p. 245; H.L. cf. *Davis v. Oswell*, (1837) 7 C. & P. 804, where the cost of hiring a horse in place of one wrongly converted was recovered.

⁷ *Cooverjee Bhoga v. R. N. Mookerjee*, (1909) 36 C. 617.

⁸ *Shridhan v. Gordhandas*, (1901) 26 B. 235.

and delivery and it is said the contract price,¹ but it does not seem obvious why the seller cannot claim the difference, if any, between the contract and the market rate, and in India it has been held that the English rule is confined to cases where there is no market rate, and if there is a market rate the cost of production or the price at which the seller had agreed to buy the goods is not to be considered.²

§ 652.

Goods to be made.

In a suit for non-delivery the buyer may, if he specially pleads it,³ recover special damage.

Special damages must be pleaded. Resales.

Under certain circumstances a buyer can recover as special damages the difference between the contract price and a price at which he resold the goods. But he cannot do so if there was a market in which he could have supplied himself with goods to fulfil his sub-sale,⁴ for he is bound to mitigate damages⁵ and can only recover the loss which he would have suffered if he had availed himself of the opportunity to fulfil his contract by going into the market.

Resale price as measure of damage.

It is only when there is no market available that the resale price comes in question. If the resale is under such circumstances as to be a fair test⁶ of the value of the goods

Where no market.

¹ *Cort v. Ambergate Ry.*, (1851) 17 Q.B. 127 (railway chairs to be manufactured; *Silkstone Coal Co. v. Joint Stock Co.*, (1877) 35 L. T. 668 (Coal to be raised by seller damages—difference between the value of unraised coal with cost of raising and the contract price), see for same view in America, *Collins v. Delafeste*, (1874) 115 Mass. 158; *Todd v. Gamble*, (1896) 148 N. Y. 382; *Tredegar Iron and Coal Co. v. Gielgud*, (1883) Cal. & E. 27; *Hinckley v. Pittsburgh*, (1886) 121 U.S. 264.

² *Cohen v. Cassin*, 1 C. 264; cf. *Tredegar Iron & Coal Co. v. Gielgud*, (1883) 1 Cal. & E. 27.

³ *The Mediana*, (1900) A.C. 113 H. L.; *Fleming v. Bank of N. Z.*, (1900) A.C. 577 P.C.

⁴ *Grebert v. Nugent*, (1885) 15 Q.B.D. p. 87, 90.

⁵ S. 73 Explanation. He can recover for the trouble and expenses involved by so doing; see illus. (b).

⁶ See *Dunkirk Colliery v. Lever*, (1879) 41 L. T. 633, affirmed in 43 L. T. 706 H.L., where the difference between the contract rate and a resale rate was given, although the resale was not advertised, but effected in the usual course of business.

§ 652.
Resale price
as measure
of damage.

at the due date for delivery under the original contract, it is the best evidence¹ of the general damages and no question of special damages arises,² it is in the same position as a transaction between third parties which would be evidence of the market value.² If in such circumstances there was notice at the time of the first sale of the resale, the buyer could claim the difference between the resale price and the contract rate as special or general damages.²

And resale
rate not
evidence of
market rate.

The question of claiming a loss on a resale as special damages arises where there is no market and the resale is from its date or circumstances no clear evidence of the market value, or where it is sought to claim the loss without having to show that such a resale price was the market value of the goods. Then there must have been notice of the resale at the time of making the original contract³; a resale after that date is immaterial, as evidence of special damages.⁴ What notice is necessary is not so clear. Illustration (j) is badly drafted, for it does not show whether notice of the resale included notice of the resale price. But having regard to the section itself, it seems that the seller is only chargeable so far as he knew of the terms of the resale.⁵

Notice of
resale.

¹ *Grebert v. Nugent*, (1885) 15 Q.B.D. p. 81; *Stroud v. Austin*, (1883) Cal. & E. 119; *France v. Gaudet*, (1871) L.R. 6 Q.B. 99; *Elbinger v. Armstrong*, (1874) L.R. 9 Q.B. 478. see *Jugmohandas v. Nusserwanji*, (1902) 26 B. p. 749

² *Ströms v. Hutchison* (1905) A.C. 515, a resale at an advanced price is evidence of a rise in market value: *Engell v. Fitch*, (1869) L.R. 4 Q.B. 659.

³ S. 73, see illustration; *Hydraulic Engineering Co. v. McHaffie*, (1878) 4 Q.B.D. 670, if there is no notice ordinary general damages are

recoverable, *Cory v. Thames Iron Works*, (1868) L.R. 3 Q.B. 181.

⁴ Section 73 illus. (o); cf. *Smeed v. Foord*, (1859) 1 E.&E. 602, 603; *Portman v. Middleton*, (1858) 4 C.B.N.S. 322; *Elbinger v. Armstrong*, (1874) L.R. 9 Q.B. 478; notice of subsequent circumstances is of no avail: *Williams v. Reynolds*, (1865) 6 B.&S. 495; see *British Columbia Saw Mills v. Nettleship*, (1868) 3 C.P. p. 505.

⁵ Cf. *Prior v. Wilson*, (1830) 1 L.T. 549; *Elbinger v. Armstrong*, (1874) 18 C.B.N.S. 445; *Grebert v. Nugent* (1885) 15 Q.B.D. 85, 90.

But it seems that if the seller knew that the goods were bought for resale,¹ he is liable for the loss of profits thereon so far as they are ordinary, that is, that knowing of the fact of a resale or of an intention to resell, he must contemplate a loss of ordinary profits if he fails to carry out his bargain.² He is also liable when he knows of an intention to resell for anticipated profits,³ and as where he has notice of an actual resale⁴ the buyer can recover as special damages an indemnity against his liability to his sub-buyer⁵ and costs reasonably incurred.⁶

§ 652.
Only ordinary profits unless notice.

In one case a seller knew that goods were bought for resale on the continent, but he did not know that the resale was made in Russia. The delivery was delayed, and there was no market in which the buyer could buy similar goods. The seller was made to pay the loss of profits on a resale,⁷ and additional freight and insurance which was paid by the buyer because of the late shipment to Russia, but not the loss incurred by the buyer because his vendee had resold, a fact unknown to the seller,⁸ which it seems could never be recovered.⁹ This decision seems

Resale price as measure of damage.

Second resale.

¹ See *Hammond v. Bussey*, (1887) 20 Q.B.D. 79; *McNeill v. Richards*, (1899) 1 Ir. R. 79; but see *Thol v. Henderson*, (1881) 8 Q.B. D. 457, which is, it seems no longer law.

² See *O'Hanlan v. G. W. Ry.*, (1865) 34 L.J. Q.B. 154, where an importer's average profits were allowed and the jury's assessment upheld without there being any evidence, for such were held to be general damages, for importers do not import to sell without some profit; that there would have been a profit was apparently presumed against a wrong-doer, see *Wilson v. Northhampton & B. Ry.*, (1874) L.R. 9 Ch. 285.

³ *McNeill v. Richards*, (1899) 1 Ir. R. 79.

⁴ *Hammond v. Bussey*, (1887) 20 Q.B. D. 79; *Agius v. G. W. Colliery*, (1899) 1 Q.B. 413.

⁵ *Hydraulic Engin. Co. v. McHaffie*, (1878) 4 Q.B.D. 670; *Grèbert v. Nugent*, (1885) 15 Q.B. D. 85.

⁶ *Elbinger v. Armstrong*, (1874) L.R. 9 Q.B. 473; *Grèbert v. Nugent*, *supra*.

⁷ As being evidence of the value at the time when they ought to have delivered.

⁸ *Borries v. Hutchinson*, (1865) 18 C.B. N.S. 445.

⁹ *Ibid.*, doubted by Bowen L.J. in *Grèbert v. Nugent*, (1885) 15 Q.B. D. p. 94.

§ 652. dubious. At any rate in India, it seems that without notice that the freights would be higher if the delivery was delayed, such damage would not be recoverable.

Loss of
market.

Damages for loss of market depend on the same principles.¹

Delay in
delivery.

If a seller delays delivery beyond the time fixed, or if no time is fixed beyond a reasonable time, the buyer is entitled² to the difference between the true value to him of the goods at the place of delivery when they were, (which is presumably the market rate,³ but if he resells at a higher rate than the market rate, the presumption is rebutted),³ and when they ought to have been delivered. But the buyer is entitled to an indemnity only, that is, his actual loss.³ If the seller knew the goods were intended for resale, the loss of profit thereon can, it seems, be claimed,⁴ and if intended for the buyer's business, profits which might have been earned but for the delay are recoverable.⁵

Special damage cannot be recovered without notice⁶ as of resales⁷ or that delay in delivery would prevent profits

¹ *The Notting Hill*, (1884) 9 P. D. 105; but see *Dunn v. Buchnall*, (1902) 2 K.B. 614.

² But he must give notice of an intention to claim damages at the time of acceptance, § 55.

³ *Wertheim v. Chicoutimi*, (1911) A. C. 301 P.C.

⁴ *Gladstone v. Sewbux*, 4 C. L. R. 106; *Borries v. Hutchinson*, (1865) 18 C. B. N. S. 445; *Wertheim v. Chicoutimi*, (1910) 16 Com. Cas., 297, (1911) A.C. 301 P.C. not if there is no notice; *Portman v. Middleton*, (1858) 4 C. B. N. S. 322; cf. the case of a carrier delaying delivery, *Madras Ry. v. Govinda Rau*, (1898) 21 M. 172.

⁵ *Fletcher v. Tayleur*, (1855) 17 C. B. 21.

⁶ Where a resale is at a special price, notice must be given of that price or only ordinary resale prices are recoverable: *Horne v. M. Ry.*, (1872) L.R. 7 C.P. 583, 8 C.P. 131.

⁷ *Gladstone v. Sewbux*, 4 C. L. R. 106; *Borries v. Hutchinson*, (1865) 18 C. B. N. S. 445; *Wertheim v. Chicoutimi*, (1910) 16 Com. Cas. 297; (1911) A. C. 301 P. C., not if there is no notice; *Portman v. Middleton*, (1858) 4 C.B.N.S. 322; cf. the case of a carrier delaying delivery: *Madras Ry. v. Govinda Rau*, (1898) 21 M. 172.

being made.¹ Apparently the buyer is entitled to hire a substitute,² at any rate if by so doing he reduces the seller's liability for damages.³ § 652.
Delay in delivery.

Where there is no market rate, the measure of damages is the difference between the value when delivered and their value when they ought to have been delivered.⁴ The best evidence of this is an actual purchase made at the time and place where the goods ought to have been delivered : whether it is made by a buyer from a party to the broken contract or by any one else.⁴ Lord Davey⁵ said the sellers would be justified in buying or in allowing their purchasers to buy in as soon as it was apparent that the contract would not be performed. The damages are, if the seller has the goods, the value of the goods when they should have been delivered less the value of the goods where left, and the amount of freight and insurance. Where no market rate.

Even if the contract to deliver and the contract to resell are not identical as to the due date, the damages are recoverable.⁶

If the goods are in consequence left on the buyer's hands, his sub-buyer having bought other goods, apparently warehouse charges are recoverable until they can be disposed of.⁷ Warehouse charges.

If a buyer delays to demand delivery for his own convenience and not at the request of the seller, he is not entitled to the benefit of any rise in market value.⁸ Where buyer makes no demand for delivery.

¹ *British Columbia Sawmill Co. v. Nettleship*, (1868) L.R. 3 C. P. 499.

² See *Mersey Docks & Harbour Board v. Owners of S.S. Marfessa*, (1907) A. C. p. 245.

³ See under Mitigating Damages p. 702.

⁴ *Ströms v. Hutchison*, (1905) A. C. 515 H. L. Sc. (carrier delaying delivery).

⁵ *Ibid.*, p. 529.

⁶ *Ibid.*; so decided partly on the ground that the defendant deliberately broke the contract for his own convenience, as to which see *ante* p. 665, 666.

⁷ *Ibid.*; the H.L. were surprised that they were not claimed: such damages were given in *Heilbutt v. Hickson*, (1872) L.R. 7 C.P. 452.

⁸ *Ex parte Llansamlet*, (1873) L. R. 16 Eq. 155; *Plevins v. Downing*, (1876) 1 C. P. D. 220.

§ 652.
Where
delivery
postponed.

The position where there has been an agreement to postpone delivery or deliveries has been discussed ; if there is no agreement, the damages where there have been deficient deliveries are to be calculated as at the due dates, and if the buyer has reasonably bought in against the seller, the difference between the contract rate and the price paid is recoverable.¹

Where buyer
resells at
more than
market rate.

If the buyer obtains a higher price for goods when accepted than the market rate that must be considered.² But the damages are the difference between the market price of goods according to the contract and the contract rate, and the fact that defective goods owing to a rise in price fetched the contract rate on resale is no defence,³ the buyer is entitled to the difference in value of goods as contracted and the goods delivered on the due date.⁴

The fact that the sellers had not possession of the goods and could only supply them under a collateral contract, is no reason for not awarding the difference between the contract and market rate.⁵

Loss of
profits.

Where a contract to supply a ship or a machine if there is delay in delivery, or the article is not as warranted, profits which would have been made in the ordinary course of things if it had been properly delivered are recoverable.⁶

¹ *Ex parte Llansamlet Tin Plate Co., Re Voss*, (1878) 16 Eq. 155.

² *Wertheim v. Chicouttmi*, (1910) 16 Com. Cas. 297 P. C ; *Wilson v. L. & Y. Ry.*, (1861) 30 L. J. C. P. 232 ; *Schulze v. G. E. Ry.*, (1887) 56 L. J. Q. B. 412.

³ *Erie County Co. v. Carroll*, (1911) A. C. 105 P. C. ; but see *British Westinghouse v. Underground E. Ry.*, (1911) 1 K. B. 575 C. A.

⁴ *Jones v. Just*, (1868) L.R. 3 Q.B. 197 ; *Jebsen v. East and West India Dock*, (1875) L. R. 10 C. P. 300.

⁵ *Cohen v. Cassim*, 1 C. 264, where the sellers had no money to pay for the goods, but could give delivery under a collateral contract.

⁶ *Lamoureux v. Eville*, (1866) 1 Ind. Jur. N. S. 274.

So where an ice machine was sold warranted to make 100 seers an hour, it was held that as it could not do this, the buyer was entitled to a return of the price paid,¹ the expenses of testing it and loss of reasonable profits.² § 652.

Where a seller agreed to supply part of a machine which he knew the buyer wanted for a machine he had sold for delivery in August, and delivery was delayed a month and the machine was consequently rejected, the seller was held liable for loss of profit on the resale, expenditure uselessly incurred in making other parts of the machine, and the cost of painting it to preserve it and of warehousing it.³ It seems that the value if any of the machine when the part was delivered, should have been allowed in reduction of the damages.⁴ Machines.

Penalties for delay in delivering goods under a sub-sale are not, unless the seller is informed of them, recoverable as damages⁵; but the seller being aware of a sub-sale but not of the date for delivery thereunder, may be, if there is no market for the goods, liable to pay the amount of such penalties as being a fair compensation for the buyer's probable liability to damages by reason of a breach caused through his default.⁵ Penalties for delay.

It was held in America that for breach of a contract to deliver an effective steamboat whereby delay was caused, the buyer could not recover the profits which American law.

¹ The seller was to be allowed to take it back; apparently it was only fairly examined. *Co.*, (1877) 47 L. J. Q. B. 239.

² *Lamoureux v. Eville*, (1866) 1 Ind. Jur. N. S. 274.

³ *Hydraulic Engineering Co. v. McHaffie*, (1878) 4 Q. B. D. 670; *cf. Wilson v. General Screw Collier*

⁴ See *Erie County v. Carroll*, (1911) A. C. 105 P. C.

⁵ *Elbinger Co. v. Armstrong*, (1874) L.R. 9 Q. B. 473; *cf. Grébert v. Nugent*, (1885) 15 Q. B. D. 85.

§ 652. might have accrued during the delay.¹ But it was said that had the claim been not for uncertain and contingent profits, but for such sum as they could have realised by chartering the boat for the period of delay, that could have been recovered.² But it has been since ruled that profits which would have been realised but for the defendant's default are recoverable, those which are speculative or contingent are not.³

Where
carriage by
sea.

Formerly where delivery was to be by sea no damages were recoverable for delay, as voyages were uncertain in duration and it was considered that the buyer did not contemplate immediate delivery. But in modern times the increased certainty of navigation has made this rule obsolete ;⁴ *see* illustration (*e*) to section 73.

Where
premature
delivery.

A party cannot sue for nominal damages because the goods were delivered before the due date,⁵ but he need not accept them until the due date.

Where
contract
avoided.

Where the seller properly avoids a contract after partial performance, he is entitled to the value of goods actually delivered and accepted.⁶ But, if under the contract the buyer is entitled to credit, the seller cannot sue for the value of goods delivered while the credit lasts.⁷

Where
buyer
rightly
rejects
suit for non-
performance
lies.

Where the buyer rightly rejects goods for breach of warranty, there seems to be some doubt in England

¹ *Blanchard v. Ely*, 21 Wendell, 342.

² *Griffin v. Colver*, (1858) 16 N. Y. 496, and this was so held in *Rogers v. Beard*, 36 Barb. 31; cf. *Callaway Mining & Manf. Co. v. Clark*, 32 Mo. 305.

³ *Griffin v. Colver*, 16 N. Y. 489, 491.

⁴ *Dunn v. Bucknall Bros.*, (1902) 2 K. B. 614, 622; *Ströms Bruks*

Aktie Bolag v. Hutchison, (1905) A. C. 515 H. L. Sc.

⁵ *Hiort v. L. & N.-W. Ry.*, 4 Ex. D. 188 C. A.

⁶ *Bartholomew v. Markwick*, (1863) 15 C. B. N. S. 710, 33 L. J. C. P. 145.

⁷ *Wayne's Merthyr Coal Co. v. Morewood*, (1877) 46 L. J. Q. B. 746, so explained in Benj. 5th Ed., 814.

whether he can sue for non-delivery.¹ But in India the law is laid down by section 118, which after stating the buyer's rights to be to accept or refuse to accept on tender or after reasonable examination to refuse to accept, adds "in any case the buyer is entitled to compensation.....for any loss caused by the breach of warranty"; the next words make the point clear: "but if he accepts.....and intends to claim compensation.....he must give notice," which conclusively show that if he rejects he can claim compensation without giving notice.² Even if, as the illustrations to the section suggest, this statement was an inadvertence, section 75 provides that a person who rightly rescinds a contract is entitled to damages sustained through the non-fulfilment of the contract. The word "rescind" is as Pollock³ points out equivalent to the English "exercises an option to treat the contract as finally broken." But whatever doubt might arise on these two sections, section 54⁴ expressly covers the case. As stated above the duty to deliver and

§ 652.
Suit for non-delivery where goods rightly rejected.

¹ See Mayne on 'Damages,' 8th Ed. (1909) 228, where it is stated no special damages are recoverable, and if the price has not been paid only nominal damages are recoverable. Benjamin does not touch the point, but impliedly supports Mayne; see 5th Ed. p. 1024. Blackbuurn does not refer to it. Laws of Eng. Vol. 10, p. 336, supports Mayne. In short all the text writers impliedly negative any such right, except Chalmers who asserts that a suit for non-delivery lies (7th Ed. 129, 6th Ed. 112) and cites *Elbinger v. Armstrong*. (1874) L. R. 9 Q. B. p. 476, commenting on *Bridge v. Wain*, (1816) 1 Stark. 504. Addison 11th Ed. 680 says the damages are the value of goods corres-

ponding to the warranty (less the contract price), but gives no authority. Campbell says a suit for non-delivery lies, 2nd Ed. 514. Such damages were allowed in *Heilbutt v. Hickson*, (1872) L.R. 7 C. P. 438, where a rule nisi was obtained as to the damages, and discharged. The Indian text writers fail to note the point.

² The case is clearly covered by s. 78, and in a carefully drafted Act the clause in s. 118 would be construed as intended to remove any doubt caused by the English Common Law.

³ Indian Contract Act, 2nd Ed. p. 342.

⁴ Set out at p. 696.

§ 652.
Suit for non-
delivery
where goods
rightly
rejected.

to pay are generally reciprocal promises and the seller cannot claim payment until he has performed or offered to perform his whole promise, and in such a case section 54 gives a right to compensation for any loss sustained owing to the non-performance of the contract. If delivery is a condition precedent to the right to payment, the same right to sue for non-delivery where the goods are rightly rejected exists. This is clear from section 55 which does not provide so specifically, but on no principle of construing an Act could the right exist in the case of concurrent conditions under section 54 and not in the case of conditions precedent under section 55, and the Legislature removes any doubt by inserting section 75.

Where goods
rightly
rejected.

If no claim for non-delivery could be made if the goods were rightly rejected, any defective tender would suffice if the buyer rejected it.

Even in England where a seller failed to ship goods according to contract, he was held liable for non-delivery.¹

Where the
seller fails
to perform
reciprocal
promise

Under section 54 of the Contract Act, "Where a contract consists of reciprocal promises such that one of them cannot be performed, or that its performance cannot be claimed, till the other has been performed and the promisor fails to perform it, such promisor cannot claim the performance of the reciprocal promise and must make compensation to the other party to the contract for any loss which the other may sustain by the non-performance of the contract." This shows that on a failure to perform a concurrent condition incumbent either on the buyer or seller, the other party can sue if he is a buyer for non-delivery, if he is a seller for non-acceptance.² The

¹ *Harland & Wolff v. Burstall*, (1901) 6 Com. Cas. 118.

² Clearly the seller on the buyer's failure to perform a condition precedent to his right to

delivery, *c.g.*, providing a ship for the goods, or paying for them if that is a condition precedent to or concurrent with delivery, can sue for non-acceptance.

case of failure to perform a condition precedent is covered by section 55 read with section 75. § 652.

Where either party prevents performance sections 53 and 54 give a right to a buyer to sue for non-delivery or the seller to sue for non-acceptance, and the same rule applies where reasonable facilities are not given for performance.¹ Where performance prevented.

Where goods are returned² for breach of warranty if the price has been paid,³ it can be recovered.⁴ Recovery of price paid.

The buyer need not return rightly rejected goods ; notice of rejection is enough.⁵ The cost of returning such goods falls on the seller,⁶ and where the contract was to deliver goods in England packed to be sent to a sub-buyer in America, the cost of returning the goods from America was recovered from the seller.⁷ Expenses of returning rejected goods.

If the seller refuses to take back the goods, the reasonable expenses of keeping them until they can be resold are recoverable from him,⁸ but only if an offer to return them has been made.⁹ Expenses of keeping.

¹ Section 67, read with ss. 53 and 54.

² See § 530 as to the right to return and as to clauses against rejection, § 523.

³ *Heilbutt v. Hickson*, (1872) L. R. 7 C.P. 438; why interest on the money paid until returned was not claimed, is not obvious.

⁴ *Caswell v. Coare*, (1809) 1 Taunt. 566; *Heilbutt v. Hickson*, L.R. 7 C. P. 438. This is so too where they perish without the buyer's default: *Chapman v. Withers*, (1888) 20 Q. B. D. 824; or become absolutely worthless: *Poulton v. Lattimore*, (1829) 9 B. & C. 259; *King v. Boston*, (1789) 7 East. 481 n.

⁵ *Lucy v. Moultet*, (1860) 5 H. & N. 229; In *Coulson v. Attwood*, 26 L. J. Ex. 244, it was held that

there was no implied term that rejection should be notified; but see S. of G. Act; Contract Act s. 118.

⁶ *Heilbutt v. Hickson*, (1872); L. R. 7 C. P. 438 why interest on the money paid until returned was not claimed is not obvious.

⁷ *Molling v. Dean*, (1902) 18 T. L. R. 217.

⁸ *Chesterman v. Lamb*, (1834) 2 A. & E. 129; *Ellis v. Chinnoek*, (1835) 7 C. & P. 169; *McKenzie v. Hancock*, Ry. & M. 436; Mayne (on 'Damages' 8th Ed. 231 n x) suggests subject to a set off for any beneficial use.

⁹ *Caswell v. Coare*, (1809) 1 Taunt. 566; *Cox v. Walker*, 6 A. & E. 523; *Ellis v. Chinnoek*, (1835) 7 C. & P. 169.

§ 652.
Expenses incurred owing to rejection by sub-buyer.

Where the sale was made to a buyer expressly to fulfil a contract made by him and he rightly rejected the goods after part had been delivered to and rejected by his sub-buyer, damages were given for the amount expended in carting goods and warehousing them when rejected by the sub-buyer, for the expense of sending the goods to the sub-buyer,¹ and of returning them to the buyer, for the loss of profit on the goods delivered and rejected by the sub-buyer, and for the loss of profits on part of the goods rejected by the buyer.²

Where goods accepted.

Where the buyer has accepted goods and there has been a breach of warranty, a claim for damages can be made,³ unless there is a contract to the contrary.⁴

Measure of damages where inferior goods accepted.

If inferior goods are delivered and accepted the measure of damages is the difference in value of goods as warranted, and of the goods delivered⁵ and not the difference between the contract price and what the goods as delivered would fetch if sold.⁶ If resold, the difference between the contract rate and the price realised on a resale, cannot be recovered as specific damages for loss of a resale.⁷ But if the resale is effected immediately or as soon as it is reasonably possible⁸ the price realised is presumptive evidence in the absence of a market rate of the value of the goods⁹ at the time. But any delay

¹ This seems unsound, for the return of the price covered this.

² *Heilbutt v. Hickson*, (1872); L. R. 7 C. P. 438, why interest on the money paid until returned was not claimed is not obvious.

³ Sections 117 and 118, under which notice must be given.

⁴ See *Wallis v. Pratt*, (1911) A. C. 394 H. L. and § 522.

⁵ *Jones v. Just*, (1868) L. R. 3 Q. B. 197; *Loder v. Kekulé*, (1857) 3 C. B. N. S. 128; *Clare v. Mayhard*, 6 A. & E. 519. This is so in America: Sedg. on 'Damages' 7th Ed. 618, 8th Ed. 762.

⁶ As wrongly held in *Caswell v. Coare*, 1 Taunt. 566.

⁷ *Clare v. Mayhard*, (1837) 6 A. & E. 519; *Cox v. Walker*, 6 A. & E. 528 n.

⁸ *Loder v. Kekulé*, (1857) 3 C. B. N. S. 128, 139; *Peterson v. Ayre*, (1853) 13 C. B. 358.

⁹ *Stewart v. Couly*, (1841) 10 L. J. Ex. 348; *Pott v. Flather*, (1847) 16 L. J. Q. B. 366; *Clare v. Mayhard*, (1837) 6 A. & E. 519; where the sale was after discovery of the breach and was evidence of the reduced value.

during which the price may have changed rebuts this presumption.¹

The mere fact that the goods have been resold under a similar warranty and no claim has been made at the time of trial by the sub-buyers is no reason against the recovery of damages for a breach of warranty.² For the jury are entitled to include in the damages the sum for which the buyer may be liable on sub-sales.³

§ 652.
Where sub-buyer has made no claim.

The fact that a rise in market value has occurred does not afford any defence.⁴ The difference is to be calculated at the due date.⁵ But the conduct of the seller may make it a later date.⁶

Rise in market value.
Due date.

Where it is customary to do so, if the percentage of inferiority is found by a survey, it is sufficiently proved and the buyer need not account for the goods.⁷

Method of proof.

Under section 118 in the case of unascertained goods notice of a claim for compensation must be made within a reasonable time after discovering the breach.⁸ This is

Notice of claim.

¹ *Waddell v. Blockey*, (1879) 4 Q. B. D. 678.

² *Dingle v. Hare*, (1859) 29 L. J. C. P. 143.

³ *Randall v. Raper*, (1858) E. B. & E. 84.

⁴ *Jones v. Just*, (1868) L.R. 3 Q.B. 197; *Jebsen v. East and W. India Dock*, (1875) L. R. 10 C. P. 300.

⁵ S. of G. Act s. 53 (3). See pp. 292, 667.

⁶ *Loder v. Kekuli*, (1857) 3 C. B. N. S. 128 (delay in reselling owing to conduct of seller; cf. *Ashworth v. Wells*, (1898) 78 L. T. 136, 14 T. L. R. 227 (warranty of a future event, i.e. that an orchid would flower white).

⁷ *Boisogomoff v. Nahapiet*, (1902) 29 C. 323. The C. A. reversed Stanley J. who held that the buyer must prove inferiority as to

each bale of jute and must account for the use he put it to in order to show the difference in value; see his judgment fully reported in 29 C. 587. On appeal it was said, a survey was sufficient in absence of any other evidence and where there was no ground for supposing any evidence was suppressed. The survey was made by experts: it is entirely different if the Court acts on its own view derived from inspecting samples, see *Kim Swoe v. Ralli*, 13 C. 237 P. C., 13 I. A. 60.

⁸ Cf. s. 55; see *Macfarlane v. Carr*, (1872) 8 B. L. R. 459, where 3 weeks' delay was held to be a waiver of a claim for inferiority; cf. *Fornaro v. Ramnarain Sookdeb*, (1875) 23 W.R. 136 (15 days), 14 B. L. R. 180.

§ 652. not so in England.¹ Any notice is, it seems, sufficient, as long as it gives the seller intimation that he will be held liable. Apparently no notice is required in the case of ascertained goods, for without express enactment no condition precedent will be implied in the case of a common law right. But a failure to give notice of a defect in quality, raises a strong presumption that the complaint is not well founded.²

Only one
standard of
damages

According to Mayne there are not two standards of damages : one, the value for use ; and the other, the value for sale,³ as suggested by Channell, B.⁴ But he suggests that, if there is no market rate, the damages recoverable for non-delivery of goods intended for resale and intended to be used by the buyer, are not the same,⁵ and there is a difference in the measure of damages for non-delivery of stocks and shares bought for investment and goods bought for sale.⁶

Breach of
warranty by
commission
agents.

In England it has been held that the rule is not the same as between commission agent and principal, for then only the actual loss can be recovered.⁷ The expression 'actual loss' in this connection means merely out of pocket expenses and not the actual loss owing to the non-fulfilment of the contract.

Where
implied
warranty of
fitness.

Where the law implies a warranty of fitness, on a breach of such warranty, the seller is liable as general damages for all consequences naturally resulting from the

¹ *Pateshall v. Tranter*, (1885) 3 A. & E. 103, Benj. 5th Ed. 1009.

² *Fisher v. Samuda*, (1808) 1 Camp. 190; *Prosser v. Hooper*, (1817) 1 Moo. 106: this is rebutted if, when accepted, the defect, though suspected, was not conclusively provable; *Fielder v. Starkin*, (1788), 1 H. Bl. 17, 2 R. R. 700; *Poultton v. Lattimore*, (1829) 9 B. & C. 259; see *Gan Kim Swee v. Ralli*, 13 C. 237 P. C.

³ Mayne 8th Ed., (1909) 17.

⁴ In *Collard v. S. E. Ry.*, (1861) 7 H. & N. 79, 30 L. J. Ex. 393.

⁵ Mayne 8th Ed. p. 218.

⁶ *Ibid.* p. 226.

⁷ *Cassaboglou v. Gibbs*, (1883) 11 Q. B. D. 797; *Salvesen v. Rederi*, (1905) A. C. 302 H. L. Sc., where only the cost of telegrams and damages for trouble and inconvenience were given.

breach, regard being had to the character of the goods and the use and purpose for which they are warranted fit.¹ **§ 652.**

It has been held that if goods are obviously marketable² or obviously intended for resale,³ the seller is liable for ordinary profits on resale if he fails to deliver proper goods. **Where obviously bought for sale.**

The Sale of Goods Act makes a distinction as to the measure of damages between cases of warranties of description or fitness and of quality⁴ which is not recognised in India⁵ under the Contract Act. **No distinction between kind of warranty.**

It has been held in England that the measure of damage is larger in the case of fraud,⁶ but this would not be so under section 73. **Fraud.**

The breach of warranty⁷ need not have been fraudulent nor is it any defence that the seller exercised due care⁸ or that the defect was undiscoverable.⁹ **Due care no defence.**

Where a defective carriage pole was sold, the seller had to pay for damage to the horses owing to its breaking.⁹ **Instances of damages for breach of warranty.**

A seller of a diseased cow warranted¹⁰ sound to a farmer was held liable to compensate him for the loss of other cows infected thereby,⁸ and a seller of a defective **Infection.**

¹ *Jackson v. Watson*, (1909) 2 K. B. 193 C. A. (tinned salmon—death of wife); *Preist v. Last* (1903) 2 K. B. 148 (hot water bottle bursting).

² *Williams v. Reynolds*, (1865) 6 B. & S. 495.

³ *Hammond v. Bussey*, (1887) 20 Q. B. D. 79.

⁴ S. 53 (2) and (3); *Bostock v. Nicholson*, (1904) 1 K. B. 725.

⁵ But see *Macfarlane v. Carr*, (1872) 8 B. L. R. 459 (where a warranty and description were said to be different *sed quere*).

⁶ *Holdsworth v. Glasgow Bk.*, (1880) 5 A. C. pp. 323, 338. See first note to § 652.

⁷ Under section 73 there is no distinction made between damages for fraud or an honest failure to perform; the dicta in

Lamouroux v. Eville, (1866) 1 Ind. Jur. N.S. 274 to the opposite effect are not now law.

⁸ *Smith v. Green*, (1875) 1 C.P. D. 92, where there was no fraud, the ground being that the seller knew that they would be put with others; cf. *Mullett v. Mason*, (1866) L.R. 1 C.P. 559, where there was fraud; *Knowles v. Nunn*, (1866) 14 L. T. 592; see *Ward v. Hobbs*, (1878) 4 A.C. 13; cf. *Groseby v. Stupleton*, 94 Mo. 423 (American).

⁹ *Randall v. Newson*, (1877) 46 L.J. Q.B. 259.

¹⁰ *Secus* if not warranted; *Hill v. Balls*, (1857) 27 L.J. Ex. 45, where damage by infection was said to be too remote.

§ 652. chain was held liable for the loss of an anchor slipped to avoid danger owing to the defect.¹ A gas company having supplied a service pipe owing to a defect in which an explosion occurred, had to pay for the damage resulting, although the explosion occurred owing to the negligence of a third party.² A supplier of bad milk had to pay for the expenses of the illness³ and death⁴ of the buyer's wife and for loss of her services.⁵ So where a workman recovered damages from his employer owing to defective goods, the seller had to pay them.⁶

Death.

Workman's
compensa-
tion.

Poisonous
goods.

Where a wall was pulled down as dangerous owing to bad mortar, the seller of the mortar was made to pay the cost of rebuilding it.⁷ Where grain mixed with lead was sold to a farmer he recovered the value of poisoned cattle, such grain being usually used to feed cattle though not expressly bought for that purpose⁸: being general damages the defendant's knowledge was immaterial.⁹ Where acid mixed with arsenic was sold to sugar refiners, the sellers not knowing the purpose for which it was sold, were held liable for the price paid, the value of materials spoilt by

¹ *Borradaile v. Brunton*, (1818) 8 Taunt. 585, which was said to be of no authority in *Hadley v. Baxendale*, 9 Ex. 347; but *Mayne* (5th Ed. 232) considers it sound and suggests had the ship been lost, the loss could have been recovered; citing *Smith v. Green*, 1 C.P.D. 92; *Scott v. Foley*, (1899) 16 T.L.R. 55.

² *Burrows v. March Gas Co.*, (1872) 41 L.J. Ex. 46.

³ Cf. *Wallis v. Russell*, (1902) 2 Ir. R. 585 C.A. (crabs for tea); *Wren v. Holt*, (1908) 1 K.B. 611 (bad beer); *Chapromere v. Mason*, (1905) *Times*, 29th of June (bun breaking tooth).

⁴ *Frost v. Aylesbury Dairy Co.*, (1905) 1 K.B. 603.

⁵ *Jackson v. Watson*, (1909) 2 K.B. 193.

⁶ *Mowbray v. Merryweather*, (1895) 2 Q. B. 640 C.A. (chain); cf. *Vogan v. Oulton* (1899) 81 L.T. 485 C. A. (defective sack hired for unloading peas—damage to workman); *Scott v. Foley*, (1899) 5 Com. Cas. 53 (defective ladder on chartered ship; injury to stevedore).

⁷ *Smith v. Johnson*, (1899) 15 T. L. R. 179.

⁸ *Wilson v. Dunville*, (1879) 6 L.R. Ir. 210; cf. in America *French v. Vining*, (1869) 102 Mass. 132 (hay containing lead).

⁹ *Bostock v. Nicholson*, (1904) 1 K.B. 725, Bruce J.

the use of the acid, being its ordinary use, but not for loss of goodwill as not being a direct and natural result, as the buyers manufactured it, nor damages recoverable by the buyer's customers on sales of which the seller had no notice.¹ The sugar refiners were sued by brewers to whom they had sold the poisonous sugar, and were held liable for the market value of beer destroyed because of the poison on the date of destruction, and not merely the cost of production, and the cost of advertising to customers the materials to be used in making beer in the future.²

§ 652.

Where dangerous goods were sold without any warning as to the danger, damages for injury to the buyer's wife were recovered.³

Dangerous goods.

In America where druggists sold to a manufacturer of ice-creams colouring matter for ices which contained arsenic, it was held that they were liable for the value of ice-creams consequently destroyed, and damages for loss of custom.⁴ In this case the sellers knew the use to which the goods were to be put, whereas in *Bostock v. Nicholson*¹ they did not.

Loss of custom.

¹ *Bostock v. Nicholson*, (1904) 1 K.B. 725, Bruce J.

² *Holden v. Bostock*, (1902) 18 T.L.R. 317 C.A.

³ *Clarke v. Army & N. Co-op. Soc.*, (1908) 1 K. B. 155 (tin of disinfectant: the plea that only the manager could warrant was overruled).

⁴ *Swain v. Schieffelin*, (1892) 184 N.Y. 471, damages for loss of customers owing to a breach of contract were not allowed where steel plates were not delivered, there being no notice; *Watson v. Gray*, (1900) 16 T.L.R. 308; and in Ireland where adulterated butter was sold warranted pure, the buyer was not given damages for loss of custom or a fine imposed for selling it, but it seems because it was his duty to test it;

Fitzgerald v. Leonard, (1898) 32 L. R. Ir. 675. But such damages were allowed where a paper refused to insert advertisements as agreed: *Marcus v. Myers*, (1895) 11 T.L.R. 327, and where a lease of a shop was not given at the proper time: *Jacques v. Millar*, (1877) 6 Ch. D. 158, followed in *Royal Bristol Building Society v. Bomash*, 35 Ch. D. 390; *Wesley v. Walker*, 26 W.R. 368, and where a bank failed to honour cheques as agreed: *Fleming v. Bank of New Zealand*, (1900) A.C. 577 P.C. Mayne on Damages 8th Ed., 234, thinks it is recoverable. To recover such damages a general plea is enough but no evidence of loss of particular customers can be given unless named in the plea: *Ratcliffe v. Evans*, (1892) 2 Q. B. 524; *Fleming v. Bank of New Zealand*, supra.

§ 652.
American
cases.

Loss of crops.

In America on a sale of wrong seed the difference in the value of the crop and of a correct crop was allowed,¹ and where inferior steel sold to make axes was used the difference in the value of the product,² and where coal dust was sold to make bricks the value of the spoilt bricks,³ and where a defective refrigerator for preserving poultry for market the loss of the poultry,⁴ and where an impotent bull for breeding the loss of milk was allowed.⁵

Resale under
same
warranty.

If a buyer resells goods under the same⁶ warranty as he bought them, reasonably believing them to be as warranted,⁷ and has in consequence to pay damages to his sub-buyer, he can recover them from the seller,⁸ and if he is sued for damages and reasonably settles the claim,⁹ or reasonably defends the suit, he is entitled to the costs of so defending; this is especially clear when he invites the seller to defend the case and is told the goods are as warranted.¹⁰ In such a case he can recover not only party and party costs but also solicitor and client costs reasonably

Damages to
sub-buyer.

Costs.

¹ *Passenger v. Thorburn*, (1866) 34 N.Y. 634; *White v. Miller*, (1877) 71 N.Y. 118; so also in England *Randall v. Raper*, (1858) 27 L.J. Q.B. 266; this would only be allowed if the buyer acted reasonably and examining the seed would usually be necessary unless planting without examination was reasonable; *Wagstaff v. Shorthorn Dairy Co.*, (1883) C. & E. 324.

² *Parks v. Morris*, (1874) 54 N.Y. 586.

³ *Milburn v. Belloni*, (1868) 39 N.Y. 53.

⁴ *Beeman v. Banta*, (1890) 118 N.Y. 538.

⁵ *Maynard v. M.*, 49 Vt. 297.

⁶ See *Bostock v. Nicholson*, (1904) 1 K.B. 725, where the resale was not with the same warranty.

⁷ Not where he could have

discovered the defect: *Wrightup v. Chamberlain*, (1839) 7 Scott. 598.

⁸ *Lewis v. Peake*, (1816) 7 Taunt. 158; *Hammond v. Bussey*, (1837) 20 Q.B.D. 79; *Mowbray v. Merryweather*, (1895) 2 Q.B. 640 C.A. (defective chain, suit by workman, reasonably settled) unless there is an agreement to the contrary: *Wallis v. Pratt*, (1911) A.C. 394.

⁹ *Wallis v. Pratt*, (1911) A.C. 394.

¹⁰ *Agius v. G. W. Colliery*, (1899) 1 Q.B. 418 C.A. (where on a claim for £150, the buyer paid £20 into Court after notice to seller, and recovered from the seller damages given, costs payable and his own reasonable costs); *Vogan v. Oulton*, (1899) 81 L.T. 435 C.A. (defective sack—workman injured—notice to seller—recovered damages and costs allowed, and his own costs of suit, but not of unsuccessful appeal).

incurred.¹ But he cannot recover such costs if the defence was unreasonable,² nor the damages claimed against him, if he paid them, although he had a good defence. § 652.

If he reasonably and properly agrees to pay damages to the sub-buyer for such a breach, he can recover the probable amount from the seller, although the amount is not fixed and no sum has been actually paid.⁴ What is a reasonable defence is a question of fact.⁴ Compromise.

If the seller advises or sanctions the defence set up in the first suit, he is liable for the costs incurred, as he has admitted that the defence was reasonable.⁵ Slight evidence of such sanction is enough, as where on notice of the suit, the seller is silent⁶ or refuses to defend, but does not forbid a defence.⁷ If on notice of the sub-buyer's Where seller sanctions defence.

¹ *Scott v. Foley*, (1899) 5 Com. Cas. 53 (defective ladder on chartered ship—suit in tort); cf. *Prince of Wales Dry Dock v. Fownes*, (1904) 90 L.T. 527; but see *Howard v. Lovegrove*, (1870) L.R. 6 Ex. 43. This was a case of a contract of indemnity; but even in such a case under special circumstances solicitor and client costs are given: *Born v. Turner*, (1900) 2 Ch. 211; *Maxwell v. British Thompson Houston Co.*, (1904) 2 K.B. 842, where it was held that in the absence of special circumstances only party and party costs, and not the costs of an appeal could be recovered. But the Judge (Kennedy J.) later doubted this, referring to Seton's Forms 6th Ed. Vol. III p. 2142 (see note to the report), where it is said the indemnified is entitled to be refunded all costs payable under the decree by him and so paid, and his own costs as between solicitor and client. See for the

definition of an indemnity 84 Ch. D. 261, and where implied L.R. 10 C.P. 196; an indemnity is not restricted by the recitals 20 Ch. D. 230.

² *Ronneberg v. Falkland Island Co.*, 17 C. B. N. S. 1.

³ *Kiddle v. Lovett*, (1886) 18 Q.B.D. 605.

⁴ *Randall v. Raper*, (1858) E. B. & E. 84; *Ashworth v. Wells*, (1898) 14 T.L.R. 227, 78 L.J. 186; cf. *Godwin v. Francis*, (1870) L.R. C. P. p. 306, where costs were allowed up to answers to interrogatories and see for the position where no claim has been made by a sub-buyer: *Dingle v. Hare*, (1859) 29 L.J. C.P. 143.

⁵ *Williams v. Burrell*, (1845) 1 C.B. 402; *Howes v. Martin*, (1794) 1 Esp. 162.

⁶ *Rolph v. Crouch*, (1867) L. R. 3 Ex. 44.

⁷ *Blyth v. Smith*, (1848) 5 M. & G. 405.

§ 652. claim the seller asserts that the goods are as warranted, that makes the defence reasonable.¹

Such costs are subject to taxation.²

Such damages are special damages.¹

Clause
against
liability for
general
damages.

Unsuccessful
appeal.

Where a seller expressly contracted that he should not be responsible for any defect in a shaft supplied save that he would replace it,³ and when the buyer sued a sub-buyer for the price who counterclaimed for damages owing to a defect, stated there was no defect. it was held in a suit by the buyer for the costs of unsuccessfully defending the counter claim, that the seller although the contract was a limited one, was liable for the costs so far as they were incurred with respect to the issue whether the shaft was defective, as being a Common Law liability out of which he had not contracted himself,⁴ but costs of an unsuccessful appeal were not allowed against him.¹

Defence
to assess
damage.

It has been held that the costs of defending an action unreasonably are not recoverable, though the incurring of such costs has been useful as leading to the assessment of the damages which could be recovered over against the defendant,⁵ it was doubted if the contrary had been decided in a previous case.⁶

¹ *Prince of Wales Dry Dock Co. v. Fownes*, (1904) 90 L.T. 527 C.A., following *Hammond v. Bussey*.

² *Salvesen v. Rederi*, (1905) A.C. 302, H.L. Sc.

³ A clause to protect against all liability must be clearly drawn, see *Wallis v. Pratt*, (1911) A.C. 394 H.L.

⁴ In no case have the costs of an unsuccessful appeal been allowed; cf. *Vogan v. Oulton*, (1899) 81 L.T. 435 C.A.; *Maxwell v. British Thomson Houston Co.*, (1904) 2 K. B. 342; *Shepherd v. Bray*, (1906) 2 Ch. p. 254.

⁵ *Hammond v. Bussey*, 20 Q.B.

D. p. 101; *Clare v. Mayhard*, (1837) 7 Car. and P. 741 (cost of Vet's certificate of unsoundness disallowed).

⁶ *Mors Le Blanch v. Wilson*, (1873) L. R. 8 C. P. 227, disapproved in *Baxendale v. L. C. & D. Ry.*, (1874) L.R. 10 Ex. 35, (where defence was unreasonable), which was followed in *Fisher v. Val de Travers Asphalt Co.*, (1876) 1 C. P. D. 511, but see these cases discussed in *Hammond v. Bussey* supra. But in *Prince of Wales Dry Dock Co. v. Fownes*, (1904) 90 L. T. 527 C. A., one ground for giving the costs was that the suit established the seller's responsibility for the defect.

Where a buyer who had resold a chattel on the same warranty, was assured by his seller that the chattel was as warranted and commenced an action for the price against his sub-buyer who had rejected it, but withdrew the action on being told by the seller that the chattel was not as warranted, he recovered the costs of the abandoned action from the seller.¹

§ 652.
Costs of suit brought by the buyer against his sub-buyer.

Under the English procedure, a defendant claiming contribution or indemnity over against a third party, can with leave give him notice to defend. If the indemnifier does not defend, he is deemed to admit the validity of any judgment obtained against the defendant by consent or otherwise and his own liability to contribute or indemnify as claimed in the notice.²

Where there has been a resale in order to recover special damages for a breach of warranty, it is necessary that the buyer should not have been negligent in failing to detect the inferiority of the goods before he resells or deals with them, otherwise the loss is not the natural result of the breach, but is due to the buyer's negligence.³

Buyer must not be negligent.

It has been held that a buyer of adulterated butter, warranted pure, could not recover the amount of a fine imposed for reselling it,⁴ but a seller of unsound fish was

Fines.

¹ *Munro v. Bennett*, (1911) S.C. 387, Ct. of Sess. (set out in Mew's Digest for 1911 p. 369). The chattel was a pump, and the buyer an unskilled person; cf. *Yonge v. Toynbre*, (1910) 1 K.B. 215, where an agent falsely warranting his authority was made to pay costs of a suit against the supposed principal.

(1839) 7 Scott 598; *Walker v. Hatton*, (1842) 10 M. & W. 255; *Hammond v. Bussey*, (1887) 20 Q. B. D. 79; see *Mowbray v. Merryweather*, (1895) 2 Q. B. 640, C. A., where the defect was difficult to discover; *Vogun v. Oulton*, (1899) 81 L. J. 485 C. A.; see *Wagstaff v. Shorthorn Dairy Co.*, (1888) Cab. & E. 324.

² Ord. 16 R. 48 to 53.

⁴ *Fitzgerald v. Leonard*, 82 L.

³ *Wrightup v. Chamberlain*, R. Ir. 675.

§ 652. made to pay the costs imposed on the buyer when prosecuted for being in possession of it and the costs of his defence, but not a fine.¹ Kennedy, J., said where the seller expressly or impliedly warrants that provisions are fit for food, a buyer fined for being in possession of them, could recover a fine if he could show that it was not imposed or increased in consequence of any default on his part.¹

Loss of resale.

If in consequence of a breach of warranty, the buyer loses a resale of which the seller knew he can recover the loss,² but as in the case of all resales if there is a market, the buyer must purchase similar goods, and the loss would then only be the difference in the price of procuring such goods and the contract rate with compensation for trouble and expense, if any, in buying.³

Keeping goods.

In such a case the buyer may have the goods left on his hands, and the seller is then liable for the cost of keeping them if he refuses to take them back, until they can be disposed of.⁴

Mitigating damages. Anticipatory breach.

In England the rule as to mitigating damages has been recently held only to apply where a contract is repudiated before its due date and such repudiation is accepted by the other party, for until then the repudiation is a mere nullity and there is no

¹ *Crage v. Fry*, (1908) 67 J. P. 240. In England where food-stuffs are sold with a warranty, a fine imposed on the buyer for being in possession of or selling such as being unfit for human food, is recoverable under the Sale of Foods and Drugs Act, (1875) 35 & 36 Vict. ch. 63 s. 38; but the defendant may show that it was wrongly imposed.

In India there seems no reason why such should not be recoverable if the buyer has used due care.

² *Hamilton v. Magill*, (1888) 12 L.R. Ir. 186; *Dingle v. Hare*, (1860) 29 L. J. C. P. 148.

³ Section 73, illus. (b).

⁴ See *Ströms v. Hutchison*, (1905) A.C. 515 H.L. Sc.

implied term that a party giving notice of repudiation may thereby have the damages assessed at any date before the due date.¹ The cases cited for a contrary proposition were explained as depending on the fact that the repudiation was accepted.² It was further said that if an anticipatory repudiation is accepted, the date of assessing damages is the date of such acceptance.¹ This last dictum is against the authorities and it seems clear that neither the measure of damages nor the date of assessment is affected, but the damages must, if possible, be mitigated,³ neither is the ruling itself as to the limitation of a duty to mitigate beyond doubt,⁴ for there are authorities against it,⁵ as well as for it.⁶

§ 652.
Mitigating
damages.

Anticipatory
breach.

¹ *Tredegar Iron and Coal Co. v. Hawthorn*, (1902) 18 T. L. R. 716 C. A. ; where a buyer did not accept the repudiation and waited in a rising market till the due date.

² *Roth v. Taysen*, (1896) 73 L. T. 628, 12 T. L. R. 274 C. A. ; *Nicholl v. Ashton*, (1901) 2 K. B. 126.

³ *Frost v. Knight*, (1872) L. R. 7 Ex. 111; *Braithwaite v. Foreign Hard Wood Co.*, (1905) 2 K. B. 543 and the H. of L. said a timely notice by a carrier of inability to deliver or of a deliberate intention not to deliver, would probably have reduced the damages to a difference in freight : *Ströms v. Hutchison*, (1905) A. C. 515 H. L. Sc.

⁴ The case is not referred to by Leake, Addison, or in the Laws of England or by Mayne, and all these authorities say that reason-

able steps if possible must be taken to reduce damages in all cases.

⁵ *Frost v. Knight*, (1872) L. R. 7 Ex. 111 ; *Wilson v. Hicks*, (1857) 26 L. J. Ex. 242 ; *Harries v. Edmonds*, (1845) 1 C. & K. 686 ; *Dunkirk Colliery v. Lever*, (1878) 9 Ch. D. 20 ; Benj. 5th Ed. 981, considers the rule only applies if performance is impossible, (citing *Nicholl v. Ashton*, (1900) 2 Q. B. 298, (1901) 2 K. B. 138 ; see argument in *Roth v. Taysen*, (1896) 12 T. L. R. 274) or where the repudiation is accepted.

⁶ *Boorman v. Nash*, (1829) 9 B. & C. 145 ; *Leigh v. Paterson*, (1818) 8 Taunt. 546 ; *Phillpotts v. Evans*, (1889) 9 L. J. Ex. 33 ; *Smith v. Maquerc*, 27 L. J. Ex. p. 472 ; *Michael v. Hart*, (1902) 1 K. B. 492 ; *Brown v. Muller*, L. R. 7 Ex. 319.

§ 652. In the case of an accepted repudiation it was held the plaintiff could only recover general damages in the absence of evidence that he could have mitigated them by entering into another contract.¹

Indian rule. The rule in India is stated in the explanation to section 73. It is clear from illustration (c) that if no time is fixed for delivery the date of the repudiation is the date for assessing damages.

Section 73, explanation. The meaning of the explanation is not clear. Whether where the date for performance is fixed, on an anticipatory repudiation, the other party must whether he accept it or not, mitigate his damages, is a doubtful point. As pointed out above the English rule is not beyond doubt. If a party tries to mitigate his damages as by making another contract, it seems that he thereby accepts the repudiation, and if he is bound so to do, the party in default can affect his damages by a notice of repudiation. The question would only arise in the absence of acceptance of a repudiation where the notice of repudiation

¹ *Roper v. Johnstone*, L. R. 8 C. P. 167, which Campbell 2nd Ed. 501 criticises, for if the new contract was made on his own account it is irrelevant and if on account of the seller, he has no authority to do so at his risk and charge him if it should turn out that by waiting the damage would have been less; see *Brown v. Muller*, L. R. 7 Ex. p. 322, where it was held there was no right to claim mitigation because the defendant might fairly object to a speculation at his expense, and the seller might lose over it owing to the insolvency of the new buyer,

for which the defendant would not be liable. But the Div. Ct. held in *British Westinghouse Co. v. U.E. Ry.*, (1911) 1 K.B.p. 584, that a party relying on a breach of contract must do what he reasonably can to keep the damages down; affirmed in C. A. (1911) W. N. 252; cf. cases of wrongful dismissal where damages are reduced if there was other employment which the plaintiff could have obtained: *Hartland v. General Ex. Bk.*, (1866) 17 L. T. 863; *Brace v. Calder*, (1895) 2 Q. B. 258; cf. *Waddell v. Blockley*, (1879) 4 Q. B. D. 678.

was unequivocal, and it has been held¹ that even then a purchaser who does not accept the repudiation need not buy in against the seller before the due date. But it has also been held that only actual loss incurred by a party acting reasonably is recoverable,² and this seems to be the correct solution of the question: a party cannot rely on his contractual right to await the due date if he could reduce the damages by acting otherwise. But he is neither justified in making nor bound to make speculative attempts to reduce the damages. Apart from cases of anticipatory repudiation, the law in England justly requires the party injured by a breach of contract to avail himself of any opportunity of which a reasonable man of business would avail himself if he were so injured and there was nobody from whom he could recover damages.³

§ 652.

Must act reasonably.

Not bound to speculate.

Under section 73 a party must minimize any damage suffered.⁴ The onus of showing that the damages could be minimized is on the party asserting it.⁵

Onus of proving mitigation possible.

¹ *Mackertich v. Nobo Coomar Roy*, (1903) 80 C. 477, following *Leigh v. Paterson*, (1818) 8 Taunt. 540; cf. *Shridan v. Girdhandas*, (1901) 26 B. p. 239; cf. *Ashmore v. Cox*, (1899) 1 Q. B. 436. In England the P. C. took the view that it was optional to do so, but the method of reducing damages there was for the buyers to manufacture the goods for themselves, which the seller could never claim as of right: *Erie County v. Carroll*, (1911) A. C. 105. The C. A. considered it a duty where machines supplied failed to work as warranted and other machines were procurable that did the work at less than the cost of working the first machines and their own price: *British Westinghouse v. U. E. Ry.*, (1911) 1 K. B. 575, Aff. 1911 N. W. 252.

² *Jugmohandas v. Nusserwanji*, (1902) 26 B. p. 749, following

Dunkirk Colliery v. Lever, (1878) 9 Ch. D. 20, 25; s. 78 explanation; cf. *Wilson v. Hicks*, (1857) 24 L. J. Ex. 242; *Nicholl v. Ashton*, (1901) 2 K. B. 126; *Roth v. Taysen*, (1896) 1 Com. Cas. 306, 12 T. L. R. 211 C. A. 73 L. T. 628.

³ *Dunkirk Colliery v. Lever*, (1878) 9 Ch. D. p. 25, approved per Kennedy L. J. in *British Westinghouse v. U. E. Ry.*, (1911) 81 L. J. K. B. 473 C. A., and in *Jugmohandas v. Nusserwanji*, (1902) 26 B. p. 749.

⁴ *Irving v. Greenwood*, (1824) 1 C. & P. 350; *Le Blanche v. L. & N. W. Ry.*, (1876) 1 C. P. D. 286.

⁵ *Brown v. Muller*, (1872) L. R. 7 Ex. 319; *Roper v. Johnson*, (1878) 42 L. J. C. P. 65; *Bank of China, Japan and the Straits v. American Trading Co.*, (1894) A. C. 264, 274 P. C.; *Michael v. Hart*, (1902) 1 K. B. 482 C. A.

§ 652.
Attempts to
mitigate.

In England it has been held that a party mitigating damages acts at his own risk¹ and can only recover the cost of so doing if he thereby lessens the other party's liability,² whereas the Privy Council held that he could recover reasonable expenses of attempts to do so that failed if he acted reasonably and not oppressively.³

It seems that in India as a duty is cast on the party to mitigate, the Privy Council's view would be followed.

Promissee
may perform
the contract.

A party on the failure of the promisor to perform his promise may perform it himself⁴ as reasonably as he can,⁵ and can recover the reasonable cost of so doing.⁶ But

Right to pro-
cure substi-
tute.

he can only recover the cost of procuring a substitute for the article undelivered, not the price at which he could sell it when procured⁵; and if that cost is equal to or less than the contract price, he can only recover nominal damages.⁵ But such cost includes the interest on moneys expended and the expenses of abortive but reasonable attempts to procure the substitute.⁷ To procure a substitute he may set up works of his own,⁵ but must deduct the price for which he sold such works at

To manu-
facture the
goods.

¹ *Brown v. Muller*, (1872) L. R. 7 Ex. p. 322; *Roper v. Johnson*, (1873) L. R. 8 C. P. 167; unless he acts at the other party's request: *Shaws Brow Iron Co. v. Birch*, 6 T. L. R. 50.

² *British Westinghouse v. U. E. Ry.*, (1911) 1 K. B. 575.

³ *Eric County v. Carroll*, (1911) A. C. 105, which is in hopeless conflict with the Div. Ct in *British Westinghouse v. U. E. Ry.*, supra. The C.A.'s method of distinguishing the cases is not very convincing: 81 L. J. K. B. 473.

⁴ This would only apply when there is no market available or such a course would mitigate damages.

⁵ *Eric County v. Carroll*, (1911)

A. C. 105 P. C.; cf. *Wertheim v. Chicoutimi*, (1911) A. C. 301 P. C.; see *Lodge Holes Colliery v. Wednesbury Corp.*, (1908) A. C. 323 (making new road after subsidence).

⁶ *Ibid.*; the C. A. held only if he in fact mitigates damages thereby: *British Westinghouse v. U. E. Ry.*, (1911) 1 K. B. 575, affirmed by C. A. (1911) W. N. 252; (1912) 81 L. J. K. B. 473.

⁷ *Eric County v. Carroll*, supra, but see for a contrary view, *British Westinghouse v. U. E. Ry.*, (1911) 1 K. B. 575; in the C. A. the point was not noticed: (1912) 81 L. J. K. B. 473; an appeal to the H. L. is now pending.

the end of the contract period,¹ or allow for their value at that time² and, unless he shows such price¹ or value, he cannot recover damages on surmise or guess. For if he purports to mitigate the damages he must clearly prove that he has suffered loss.¹

§ 652.

Onus of
proving cost
of mitigating.

The Divisional Court³ in England held that there was no authority that any concomitant and ancillary advantage accruing to a party from the course adopted for mitigating damages, can be considered to reduce the damages, and that a transaction *inter alios* is irrelevant. This is in direct conflict with a Privy Council ruling,⁴ and is not the law under section 73 which implies that any circumstances⁵ must be considered in reducing damages.⁶

Ancillary
benefit from
mitigating.

¹ *Erie County v. Carroll*, (1911) A. C. 105 P. C.; cf. *Wertheim v. Chicoutimi*, (1911) A. C. 301 P. C.; see *Lodge Holes Colliery v. Wednesbury Corp.*, (1908) A. C. 323 (making new road after subsidence).

² A point lost sight of in the Div. Ct. & C. A. in *British Westinghouse v. U. E. Ry.*, supra.

³ *British Westinghouse v. U. E. Ry.*, (1911) 1 K. B. 575, affirmed in C. A. (1911) W. N. 252; cf. *Joyner v. Weeks*, (1891) 2 Q. B. 31.

⁴ *Erie County v. Carroll*, (1911) A. C. 105; see *Wertheim v. Chicoutimi*, (1911) A. C. 301 P. C. (resale prices below market rate).

⁵ See *Lachmi Narain v. Vernon*, (1906) Punj. Rec. No. 137, where claim for refusing to take a house was reduced by sum which might be obtained as rent, which however conflicts with the rule that the defendant must prove that the damages could be reduced; and conflicts with *Joyner v. Weeks*, (1891) 2 Q. B. 31, which however is not good law in India. It seems, however,

that such reduction should only be allowed where proved; the explanation does not mean that a Court is to speculate as to the supposititious mitigation hypothetically possible under imaginary circumstances. The means of mitigating must exist; there is nothing about probable means. The P. C. declined to assess damages on surmise or guess in *Erie County v. Carroll*, (1911) A. C. 105.

⁶ Probably this would not include an access of profit in another transaction to some of the plaintiffs owing to a breach of the contract in suit: see *Jebson v. E. & W. India Dock Co.*, (1875) L. R. 10 C. P. 300, and of course not insurance moneys payable owing to the breach: *Yates v. White*, (1838) 4 Bing. N. C. 272. It has been frequently held in England that damages are not reducible by an accidental benefit to the plaintiff; thus in suits for non-repairs, the fact that repairs have become unnecessary or useless, is no defence: *Rawlings v. Morgan*, (1865) 34 L. J. C. P. 185; *Morgan v. Hardy*, (1886) 17 Q. B. D. 780, affirmed 35 W. R. 588; *Joyner v. Weeks*, (1891) 2 Q. B. 31.

§ 652.
Ancillary
advantage
from miti-
gating.

In the Appeal Court¹ the view taken was that the Privy Council rulings were distinguishable. Buckley, L. J., said that if a party entitled to damages does an act reasonably and prudently to reduce the damages, he need not give credit for an additional advantage that flows to him from so doing, if the reasonableness and prudence of the course adopted was attributable only to the position in which he found himself owing to the breach of contract²; but he must do so, if the course adopted was also attributable to consideration of his own pecuniary advantage.³ If the course adopted was reasonable for the purpose of mitigating the damages, apart from its prudence for his own pecuniary advantage, to recover the expenses incurred it must be shown to be either the only course open or the least expensive for the purpose of mitigating the damage accrued.

It seems that the distinction is too refined, and that the two decisions⁴ of the Privy Councils are opposed to the Appeal Court. The party aggrieved is only entitled to an indemnity, never anything more ; and must give credit for any advantage which is of pecuniary value to him.

Courage and
enterprise.

The Privy Council ruled that courage and enterprise shown in mitigating damages was not to be considered⁴; but it seems in India, having regard to section 73, illustration (b), that as compensation can be recovered for

¹ (1912) 81 L. J. K. B. 478 ;
an appeal is pending.

² Giving as an illustration :
taking a fast train, first class only,
in order to arrive as early as by
a train which did not run owing
to the negligence of the Company,
for which a third class ticket
had been taken.

³ *Erie County v. Carroll*, (1911)
A. C. 105, was distinguished, as
the course adopted was prudent

for the plaintiffs, not merely to
mitigate damages. But the P. C.
proceeded on no such view ; if
they had, costs of abortive reason-
able attempts would not have
been said to be recoverable.

⁴ *Erie County v. Carroll*, (1911)
A. C. 105 ; see *Wertheim v. Chi-
coutimi*, (1911) A. C. 301 P. C.
(resale prices below market
rate).

trouble incurred in mitigating damages, such a claim § 652.
might be made as coming under that head.

Where the defendant delayed in supplying a ship, it Where delay.
was held that the plaintiff could recover charges for detain-
ing trucks, although had he sent the goods into the docks
no charges would have been incurred.¹ In America the American
principle is that no damages are recoverable for injurious law.
consequences of a breach of contract so far as the
party had information, time and opportunity necessary to
prevent them.²

Where a buyer had a right by agreement to buy against Right to buy
the seller if in default, the seller cannot claim the benefit against
of a purchase at less than the contract rate.³ seller.

There is one point on which there is no authority. It
a buyer orders goods to be made and wrongfully rejects
them, even if the seller receives an order for identical
goods at the same price on the day of rejection and sup-
plies the rejected goods, he loses the profit on the first
sale, and it seems can recover it.

In an action for conversion of goods against a Action for
bailee where the plaintiff's title rests on estoppel, the conversion.
measure of damages is the full value of the goods, the
subject matter of the conversion, and not the pecuniary Estoppel.
value of the prejudice on which the estoppel depends, as
where a bailee is estopped, by a representation that the
goods are available for the plaintiff's contract, from setting
up a lien or a *jus tertii*, although such representation was
made to the buyer after he had paid for the goods and
the prejudice to him, occasioned by his resting satisfied

¹ *Welch v. Anderson*, 61 L.J.Q.B.
167 C.A., where the dock charges
for delivering were higher
than the Railway charges but
they stored for three weeks free.
The seller was held to be entitled
to deliver in any reasonable way,
and not bound to act so as to

protect the buyer against the
results of a breach of contract.

² Sedgwick, 4th Ed. 235: *Cincinnati and Chicago Air R. R.
Co. v. Rodgers*, 24 Ind. 103.

³ *Simmonds v. Millar*, (1899)
4 Com. Cas. 64.

§ 652. with the bailee's representation, is of the slightest value.¹ As between seller and buyer the damages are the same, whether the suit is in tort or in contract.² As against third parties the general damages are the full value of the goods at the time of the wrongful act.³

Reducing
damages.

A defendant may in a suit for the price counter-claim for breach of warranty; the onus of proving non-compliance with the contract in a suit for non-acceptance is on the seller,⁴ but the onus of proving inferiority is on the buyer if he counterclaims after acceptance of the goods; but the defendant may show that the plaintiff could have reduced the damages, that is that he did not act as a prudent man should have done; he may show that the plaintiff did not suffer the whole loss, but owing to the circumstances suffered less damage than the natural and probable damage, but for this purpose the fact that the plaintiff had insured, is irrelevant.⁵

Where the contract was to carry a quantity of goods, which were delivered late, the greater portion being too

¹ *Knights v. Wiffin*, (1870) L. R. 5 Q. B. 660; *Henderson v. Williams*, (1895) 1 Q. B. 521; *Ogilvie v. West Australian M. & A. Corp.*, (1896) A. C. 257; where the dicta to the effect that where a defendant is estopped from setting up a claim, the damages are limited to the amount which, but for his conduct raising the estoppel, could have been recovered by the plaintiff, were disapproved, as being founded not on the law as it was, but as it ought to be: p. 270. Therefore it seems that in the mofussil if not in Presidency towns, the dicta would be followed.

² *Chinery v. Viall*, (1860) 29 L. J. Ex. 180 *Johnson v. Stear*,

(1868) 33 L. J. C. P. 130; *Hiort v. L. & N.-W. Ry.*, (1879) 4 Ex. D. 188, *secus*, in England, if the seller wrongfully retakes goods after delivery: *Gillard v. Brittan*, (1841) 8 M. & W. 575; but see *Johnson v. L. & Y. Ry.*, (1878) 3 C. P. D. p. 507; in India only the actual loss is recoverable.

³ *Chinery v. Viall*, *supra*; *France v. Gaudet*, (1871) L. R. 6 Q. B. 199.

⁴ See para. 287; the onus is heavy after acceptance after examination and a long delay before any claim is made: *Gan Kim Swee v. Ralli*, (1886) 13 C. 237 P.C.; as to the effect of repudiation on such a claim, see para. 553.

⁵ *Bradburn v. G. W. R.*, (1874) L. R. 10 Ex. 1.

late to fulfil a resale, and the sub-buyers bought in against their sellers there being no market, the House of Lords held that the buyer need not have given the carrier credit for a profit realised on the rest.¹

§ 652.

Interest may be allowed by way of damages.²

Interest.

If a contract is made in the alternative, damages will be assessed against the promisor on the alternative which is less profitable to the plaintiff and less burdensome to the defendant.³

Alternative performance.

Where the contract is to deliver from 2,500 to 3,500 tons the damages must be estimated on the lesser amount only even where the seller has given notice that he was shipping the larger amount.⁴ But this last proposition seems dubious, and it seems that the seller having an election as to the amount, would, after electing, be liable for the quantity he said he would deliver⁵ at any rate if the buyer altered his position in consequence.⁶

Contract to deliver optional quantity.

Damages may be recovered, although the plaintiffs are not entitled to the whole in their own right and although the damages are divisible between the plaintiffs and other parties in unknown proportions⁷; they recover as trustees for the parties interested.

Plaintiff not solely entitled to damages.

Where a fresh action may be brought for any damage arising after suit, the plaintiff is not entitled to recover it

Future damages.

¹ *Ströms v. Hutchinson*, (1905) A. C. 515 H. L. Sc.

² *Lala Chhajmul v. Brij Bhahan*, 22 I. A. 199; *Jogeshur v. Ghanashim*, (1901) 5 C. W. N. 356; in *Shriram v. Murlangopal*, (1903) 30 C. 865 P. C., interest was given.

³ *Cockburn v. Alexander*, (1848) 6 C.B. 791, 814; *Deverill v. Burnell*, (1873) L. R. 8 C. P. 475; except where one alternative is rendered impossible by the promisor, when

he is bound to perform or pay damages for the other: *Mc Ilquham v. Taylor*, (1895) 1 Ch. 53, 62; *Hall v. Condor*, (1857) 2 C. B. N. S. 22.

⁴ *Curselji Pestonjee v. Crowder*, 18 B. 299.

⁵ See *Reuter v. Sala*, (1879) 4 C. P. D. 239.

⁶ See § 184.

⁷ *Robertson v. Wait*, (1853) 8 Exch. 299; cf. *Hooper v. Hertz*, (1906) 1 Ch. 549.

§ 652.
Future
damages.

in that suit,¹ but where the cause of action was complete at the time of commencing the suit and no fresh suit lies,² the jury may and ought to assess any loss which will probably be sustained in the future,³ and such assessment is final.⁴

In a case of successive breaches, it was said whether damages for breaches can be recovered up to decree, no damages can be given in respect of breaches which will occur thereafter,⁵ or for the continuance of breaches.⁶

Depending
on a contin-
gency.

The existence of a contingency which is dependent on the volition of a third person does not render the damages for breach of contract incapable of assessment.⁷

In *Sapwell v. Bass*⁸ it was held that for breach of a contract giving a right to send a mare to a stallion, only nominal damages were recoverable. But that does not mean that a plaintiff is entitled to no damages for being deprived of a right, because the final result depended on a chance or contingency.⁷

¹ *Crumbie v. Wallsend Local Board*, (1891) 1 Q. B. 508; *Coward v. Gregory*, (1866) L. R. 2 C. P. 153; *Hole v. Chard Union*, (1894) 1 Ch. 293 C.A.; R.S.C. Ord. XXXVI R. 58.

² In India a party must sue on all accrued rights: *Rajah Bahadur Shivalal v. Rajeevappa*, (1909) 11 Bom. L. R. 46.

³ *Richardson v. Mellish*, (1824) 2 Bing. 229; *Tetley v. Wanless*, (1867) L. R. 2 Ex. 275; *Lambkin v. S. E. R.*, (1880) 5 A. C. 352; *Hodsoll v. Stallebrass*, (1840) 11 A. & E. 801; *Darley Main Colliery v. Mitchell*, (1886) 11 A. C. p. 132, 144; *Fetter v. Beal*, (1701) 1 Salk. 11, 1 Raym. 339, 692; see *Dominion Coal Co. v. Dominion Iron Co.*, (1909) A. C. 293 P. C.; *Emery v. Wells*, (1906) A. C. 515 P. C.;

Phillips v. L. & S. W. Ry., (1879) 5 Q. B. D. 78; so held in India: *Purshotamdas v. P.*, (1896) 21 B 23.

⁴ *Gibbs v. Cruikshank*, (1873) L.R. 8 C.P. 454, 463, *Ex parte Fewings*, (1884) 25 Ch. D. 338; *Furness v. Hall*, (1909) 25 T. L. R. 233.

⁵ *Fraser v. Bombay Ice Co.*, (1905) 29 B. 197.

⁶ *Lloyd v. Dimmack*, (1877) 7 Ch. D. 398, *Henderson v. Thorn*, (1893) 2 Q. B. 164.

⁷ *Chaplin v. Hicks*, (1911) 2 K. B. 786 C. A. (chance of being selected for an appointment), see *Watson v. Ambergate Ry.*, (1851) 15 Jur. 448 where the chance of winning a prize was held too remote.

⁸ (1910) 2 K. B. 486.

The parties may fix the damages for breach of a contract.¹ In India,² section 74 has done away with the English distinction between liquidated damages and penalties.³ § 652.
Liquidated damages.

The question usually arises in cases where provision is made for increased interest,⁴ but the point rarely, if ever arises in a contract for the sale of goods.

A condition that a deposit shall be forfeited if the contract is not carried out, is not a penalty and will be enforced.⁵ A deposit⁶ or earnest money⁷ is given to show that a party means business, and is not recoverable if the party is in default in completing his contract. Forfeiture of deposit.

Where a fixed sum is to be paid daily or weekly for delay in completing work, it has been held not to be a penalty.⁸ Liquidated damages for delay.

Where the agreement was to deliver indigo or pay fixed damages, such were held to be a penalty and only reasonable damages given.⁹ Where the parties have agreed to have the measure of damages assessed by a skilled tribunal, the arrangement is valid.¹⁰

Damages may be recovered against a party who wrongfully takes a bill of lading and refuses to accept a bill of exchange sent with it through the sellers' agents.¹¹ Where bill of lading taken wrongfully.

¹ *Diestal v. Stevenson*, (1906) 2 K. B. 345.

² *Deno Nath Santh v. Nibaran*, (1899) 27 C. 421, 423; *Umarkhan Mahamadkhan v. Salekhan*, (1892) 17 B. 106, 111.

³ *Balkuraya v. Sankamma*, 22 M. 458.

⁴ *Sundar Koer v. Sham Krishen*, 84 I. A. 9, 18, 84 C. 150.

⁵ *Maniam Patter v. M. Ry.*, (1906) 29 M. 118; cf. *Hinton v. Sparkes*, L.R. 3 C.P. 165; *Soper v. Arnold*, 87 Ch. D. 96, *Wallis v. Smith*, (1882) 21 Ch. D. 243, 260; *Empress of India Cotton Mills v. Naffer*, (1898) 2 C. W. N. 687 (forfeiture of arrears of wages for

leaving service without notice).

⁶ *Madan Mohun Singh v. Gaya Prosad*, (1911) 14 C. L. J. p. 187.

⁷ *Rasik Lal v. Chundra Bhusan*, (1911) 15 C. L. J. 410.

⁸ *Law v. Redditch Local Board*, (1892) 1 Q. B. 127.

⁹ *Nait Ram v. Shib Dat*, (1882) 5 A. 288, dist. in *Dilbar Sarkar v. Joysri*, (1898) 3 C. W. N. 48.

¹⁰ *Pestonge v. Firm of Jaisingdas*, 8 C. W. N. 57 (1903) P.C. (fixing the rates for imaginary purchases of unobtainable cotton).

¹¹ *Rcw v. Payne*, (1886) 53 L. T. 982.

§ 652.
Against
bailee
refusing to
deliver.

§ 653.
Right of
inspection.

§ 654.
Right of
rejection.

So a bailee who refuses to deliver goods to the holder of a warrant therefor, is liable for damages for non-delivery.¹

An action lies for refusing to give a bill as agreed.²

The question as to how far the buyer's right of examination extends have been discussed already³

The buyer if he intends to reject the goods, must give the seller notice unequivocally and in a reasonable time,⁴ and subject to legitimate examination he must, save in cases of fraud or misrepresentation, let the sellers have the goods back in the same condition as that in which he purchased them, subject of course to any inevitable deterioration; and after rejection his position is that of an involuntary bailee,⁵ and he is entitled to recover any necessary expenses incurred in keeping the goods.⁶

The buyer has a right to reject goods, unless there is a clause in the contract to the contrary⁷ :—

- (1) Where they do not conform to the contract whether the property has passed or not, unless the stipulation which is not complied with was something collateral to the contract.⁸
- (2) Where the seller refuses him an opportunity to inspect them when properly demanded, even if he afterwards offers them for inspection :⁹ this again is subject to the terms of the contract.¹⁰

¹ *Thol v. Hinton*, (1855) 4 W.R. 26 (Eng.) 46 L. T. 483.

² *Rabe v. Otto*, (1904) 89 L. T. 562.

³ § 622.

⁴ *Blackburn*, 3rd 543, S. of G. Act, s. 35.

⁵ See Contract Act, s. 151.

⁶ Contract Act, s. 158.

⁷ *Polenghi v. Dried Milk Co.*, (1905) 92 L. T. 64, 21 T. L. R. 118, see § 523.

⁸ See §§ 613, 614; *Heyworth v. Hutchinson*, (1867) 36 L. J. Q. B. 70.

⁹ See § 618, § 619, *Lorymer v. Smith*, (1822) 1 B. & C. 1 (as to a sale by sample); *Chalmers v. Paterson*, (1897) 34 Sc. L. R. 768; and as to not being able to make a second tender after one is properly rejected : *Heilgers v. Jaduball*, 16 C. 417 *sed quaere*, whether a second tender in time is not allowable, see *Borrowman v. Free* and para. 184.

¹⁰ *Polenghi v. Dried Milk Co.* (1905) 92 L. T. 64, 21 T. L. R. 118, see § 523.

- (3) Where, although the property has passed, goods do not arrive at the stipulated time¹ or are unmerchantable on arrival.² **§ 654.**
Right to reject.

- (4) Even after delivery and acceptance where delivery was by instalments under an entire contract and no part of the price payable until complete delivery, if the whole quantity is not delivered,³ or even if paid for, where the whole was indivisible as a book and parts have been delivered and the rest is not delivered ; see section 535.

- (5) Under an express term in that behalf.⁴

This right must be exercised in reasonable time, but a seller who by his representations to an unskilled buyer induces delay, cannot plead that the rejection was not in time.⁵ The right is lost by acceptance.⁶ **Must be in reasonable time.**

In some contracts there is a provision for the return within a fixed⁷ time of the thing sold if not answering to the warranty. The time for return runs from the actual receipt of the goods by the buyer and not from their delivery to a carrier for transmission.⁸ Where the return of the thing is made obligatory on the buyer who complains of a breach, his only remedy is to return the goods and receive back his purchase money ; he cannot sue for breach of warranty whether he returns the thing or not⁹: if, however, the contract merely confers power on the buyer to return the goods if faulty, the better opinion is that he has **§ 655.**
Sale or return.

¹ S. of G. Act, s. 10 (1) Benj. 5th Ed. 588, 1005.

² *Beer v. Walker*, (1877) 46 L. J. C. P. 677.

³ *Colonial Ins. Co. v. Adelaide*, (1886) 12 A. C. 128.

⁴ See, for right to return, § 580.

⁵ *Munro v. Bennett*, (1911) S. C. 387 Ct. of Sess. (set out in *Mews Digest* 1911, p. 369.)

⁶ See § 618, § 623, § 628.

⁷ If no time is fixed, the goods must be returned in a reasonable time : *Marsh v. Hughes Hallett*, (1900) 16 T. L. R. 376, otherwise the property passes.

⁸ *Jacobs v. Harbach*, (1885) 2 T. L. R. 419.

⁹ *Mesnard v. Aldridge*, (1801) 8 Esp. 271 ; *Hinchcliffe v. Barwich*, (1880) 49 L. J. Ex. D. 495, 5 Ex. D. 177 C. A.

§ 655. this remedy superadded to his other rights.¹ In India the contractual right to return would not impliedly displace the statutory right to sue for breach of warranty or for non-delivery : it might do so expressly.

Where goods are damaged or perish.

In such a case the buyer, during the period within which he may return the thing, does not take the risk of its perishing² or being damaged³ without any default on his part. He can still exercise his option,² for if he cannot return the thing owing to its having perished, he is excused from doing so and can recover the price paid.³

Goods sent on approval.

For an ordinary contract for sale or return, *see* para. 157.⁴ Where goods are sent on approval the goods are rejected and the delivery determined when the person to whom they are sent says he will not pay the price asked by the seller.⁵

§ 656.
Loss of right to reject.

Generally the right to reject is only lost by acceptance express or implied,⁶ or by waiver.

A clause that the buyer cannot reject for inferiority and for reference to arbitration to fix an allowance,⁷ is binding.

Even if the right to reject is lost, a claim for compensation is generally available.⁸

Wrongful rejection.

If the buyer wrongtully rejects goods or refuses to take delivery after the property has passed, he is liable to a

¹ Benj. 5th Ed. 1010, who cites American cases to support this view : *Magrane v. Loy*, (1839) 1, Craw. & Dix, Ir. Circt. Ct. 286.

² *Chapman v. Withers*, (1888) 20 Q. B. D. 824 ; *Elphick v. Barnes*, (1880) 5 C. P. D. 321.

³ *Head v. Tattersall*, (1871) 41 L. J. Ex. 4 L. R. 7 Ex. 7.

⁴ *See* for agreement for sale or return property not to pass until payment or the like : *Weiner v. Gill*, (1906) 2 K. B. 574 ; *Truman*

v. Attenborough, (1910) 26 T.L. R. 601 ; *Edwards v. Vaughan*, (1910) 26 T.L.R. 349, affirm *ibid.* p. 545 ; the property does not pass until the condition is fulfilled.

⁵ *Bradley v. Ramsay*, 28 T.L.R. 13.

⁶ *See* § 559.

⁷ *Heyworth v. Hutchinson*, (1867) L. R. 2 Q. B. 447, and *see* § 558.

⁸ Section 117, 118 and *see* § 568.

suit for the full price¹; but in such a decree it seems the price should be made recoverable only on delivery or tender of the goods, as otherwise the seller may recover on the decree and deal with the goods as owner.

In contracts dependent on a contingency where the buyer has the right to reject goods, the seller is not bound to deliver them. As where the contract was for 50 tons of oil "to arrive per *Mansfield* : in case of non-arrival or the vessel's not having so much on board after delivery under former contracts, this contract to be void." Part of the cargo was transhipped ; and on arrival after deliveries under former contracts, only seven tons remained. The Court held, the contract being entire, the buyer was not entitled to the seven tons which did arrive² : and a similar decision was come to where the contract was for a cargo of 400 tons provided the same be shipped for seller's account, more or less of A. N. rice, part of which might be L. rice ; but not more than 50 tons. The cargo on arrival consisted of 285 tons of L. rice and 152 of another sort : the ground of the judgment was that as the buyers were not bound to accept, the sellers need not deliver, for the contract must be mutual and reciprocal.³

§ 657.
Mutuality
of rights.

But in the case of the determination of an election where the agreement is that as each bag or bale is put on board the property passes, the buyer has, if the whole quantity is not completed, an option to reject and yet the seller is bound to deliver the part appropriated.⁴

Where an
election as to
each item.

Where the contract which has been broken by the seller is one in which the property has passed to the buyer, there arise in favour of the latter the rights of an owner,

§ 658.
Where the
property
has passed.

¹ *P. R. & Co. v. Bhagwandas*, (1909) 11 Bom. L. R. 335, 34 B. 192 C. A. ; *Finlay Muir v. Radhakissen*, (1909) 36 C. 736.

² *Lovatt v. Hamilton*, (1839) 5 M. & W. 639.

³ *Vernede v. Weber*, (1856) 25 L. J. Ex. 326: the Court hesitated as to this, but Benjamin considers it sound: 5th Ed. 585 *n*.

⁴ *Anderson v. Morice*, (1875) L.R. 10 C.P. 609; per Bramwell J., 1 A. C. p. 727.

§ 658. for he has not only the property in the goods, but unless he is in default, the right of possession also.

He has the same rights in a suit for damages as in the case of an agreement to sell.

§ 659.
Specific
perform-
ance.

In certain cases he can compel the seller to deliver the very thing sold, *i. e.* he can sue for specific performance of the contract. But he has no such right, unless pecuniary compensation would not afford adequate relief¹; and the presumption is that the breach of a contract to transfer moveable property can be adequately relieved by such compensation.²

Generally speaking, specific performance is only granted in cases where the goods are unique³ or have a special value to the buyer⁴ or are not readily to be purchased.⁵

§ 660.
Suit for
conversion.

The buyer may also sue for conversion of the goods, but that will not increase his damages⁶.

For if the conversion was before delivery so that the seller cannot maintain an action for the price, the damage is the difference between the contract and the market price.⁷ But if the conversion was after delivery and the seller has still his right to sue for the price, as where he tortiously retakes after delivery, he may sue for the full value⁸ and the seller can sue for the price.

¹ Specific Relief Act s. 12, *cf.* S. of G. Act s. 52.

² *Fells v. Reid*, (1796) 3 Ves. 70; *Falcke v. Gray*, (1859) 4 Drew. 458, and *see* Banerji's *Tajore Law Lectures on S. P.* p. 109; but *semble* the distinctions there laid down are illusory.

³ *Falcke v. Gray*, *supra* *Donnell v. Bennett*, (1883) 22 Ch. B. 335.

⁴ *Claringbuild v. Curtis*, (1852) 21 L. J. Ch. 541 (a barge); *cf.* *De Matlos v. Gibson*, (1859) 4

De G. & J. 276.

⁵ *Cud v. Rutter*, (1719) 1 P. W. 570, *South Sea Stock*; *Hawkins v. Maltby*, (1869) 4 Ch. 100; *Patne v. Hutchinson*, (1868) 3 Ch. 388, and § 118.

⁶ *Benj.* 5th 996, and *see* under "Wrongful resale."

⁷ *Chinery v. Viall*, (1860) 29 L. J. Ex. 180.

⁸ *Gillard v. Brittan*, (1841) 8 M. & W. 575.

The position where the seller has resold goods, the property in which has passed to the buyer, has been considered under section 108. Wrongful resale.

After delivery the buyer's right as has been submitted, remains the same as before delivery until he accepts ¹ the goods,² whether specific or otherwise at the time of the contract.³ § 661.
After delivery.

¹ As to what amounts to acceptance, *see* § 613.

³ As to breaches of warranty of title, *see* under s. 109.

² *See* s. 117, s. 118.

CHAPTER XVIII.

Auction Sales.

§ 662.
Auction
sales.

Goods are frequently sold by auction. An auction is a manner of selling or letting property by bids, and is usually to the highest bidder by public competition.

Definitions.

§ 663.
Authority
of
auctioneer.

Agency of
auctioneer.

An auctioneer is one who sells goods or other property by auction. He is an agent and is governed by the general laws of agency. He may, however, sell his own property as principal, and need not disclose the fact that he is so selling¹; but when selling as agent he is agent of the vendor only,² except in England after the sale for the purpose of signing a memorandum of sale.³

Form of
contract.

The contract may be verbal or in writing.

Extent of
authority.

The implied authority of an auctioneer apart from express instructions narrowing or amplifying it,⁴ is a general authority to sell and extends to selling and dealing with the property in the way usual amongst auctioneers.⁵ He has ostensible authority to sell without reserve,⁶ and if after a bid is accepted the seller sets up a restriction on the auctioneer's authority which was not disclosed at the time, the buyer's remedy is not against the auctioneer for breach of warranty of authority,⁷ but against the seller on a contract of sale.⁸ But if the buyer knew of the reserve although the amount is not stated, there is no implied authority to sell without reserve, even though the auctioneer purports to do so; and if in

To sell with-
out reserve.

¹ *Flint v. Woodin*, (1852) 9 Hare 618.

² *Warlow v. Harrison*, (1858) 29 L.J. Q. B. 14.

³ *I.e.*, for the purposes of the Stat. of Frauds, now embodied in the S. of G. Act; see Benj. 5th Ed. 280.

⁴ *Howard v. Braithwaite*; (1812) 1 Ves. & B. p. 210.

⁵ *Collin v. Gardner*, (1856) 21

Beav. 540.

⁶ *Rainbow v. Hawkins*, (1904) 2 K.B. 322.

⁷ As to under what circumstances an agent warrants his authority, see *Yonge v. Toynbee*, (1910) 1 K.B. 215 C.A.

⁸ *Rainbow v. Hawkins*, (1904) 2 K. B. 322, doubted in *McManus v. Fortescue*, (1907) 2 K.B. 1.

breach of his instructions, the auctioneer sells without reserve, a sale below the reserve price will not give the purchaser any right against the vendor.¹ For every offer by the auctioneer and every bid including the final one and the acceptance of that final bid indicated by the fall of the hammer, is conditional on the reserve being reached.¹ But if the vendor's instructions are to carry out a sale subject to a secret reserve and so to act as an agent in effecting a fraud, the auctioneer will not be liable to the vendor for disregarding such instructions.²

Sale below
reserve price.

The agency is personal and cannot be delegated,³ unless under an ordinary custom of trade⁴: it is the usual custom in most places for any of the auctioneers in a firm to sell goods.

Delegation.

If an auctioneer sells goods which he has no right to sell, he may or may not be guilty of conversion according to the circumstances.⁵ Generally, however innocently he acts, he is liable to the true owner for conversion or to the owner's assignee for value, although he had no notice of such assignment.⁶ The liability depends on whether he is instrumental in passing the property or is a mere conduit pipe, *e. g.*, negotiates a sale and earns a commission.⁵ Generally the auctioneer is the former and is therefore liable for conversion.⁷

Sales without
authority.

Apart from any special contract, the implied agency extends to receiving deposits on sales both of land and

Authority to
receive
payment.

¹ *McManus v. Fortescue*, (1907) 2 KB 1.

² *Boxwell v. Christie*, (1776) 1 Cowp. 395.

³ *Coles v. Trecothick*, (1804) 9 Ves. 234, 250, 7 R.R. 167.

⁴ Contract Act s. 190.

⁵ *Barker v. Furlong*, (1891) 2 Ch. 181, *see* Sol. Journal Vol. 88, p. 480.

⁶ *Consolidated Co. v. Curtis*, (1892) 1 Q.B. 499; *semble* s. 186 of the Contract Act does not affect this.

⁷ Compare cases where a public salesman in a market overt has been held liable for conversion: *Ganly v. Ledwidge*, (1876) Ir. R. 10 C.L. 33, 183; *Delaney v. Wallis*, (1884) 14 L.R. Ir. 31 C.A.

goods,¹ and to receiving the purchase money on sales of goods,² but not on sales of lands.³ But the conditions of sale may be such as to show that the seller intended payment to himself, and then payment to the auctioneer will not bind the seller.⁴

Mode of
payment.

He may have authority by custom to receive payment of deposit by cheque,⁵ but is not compellable to do so;⁶ he must not receive payment by bill of exchange or post-dated cheque.⁷

By cheque.

But he has not authority, in absence of express instructions or of a custom to receive cheque,⁸ to accept payment of the purchase money otherwise than in cash.⁹ If, however, a cheque is taken and duly honoured that is payment in cash.¹⁰ Of course,¹¹ the auctioneer cannot take in payment a claim against himself,¹² but the seller may be

¹ *Sykes v. Giles*, (1839) 5 M. & W. 645.

² *Williams v. Millington*, (1788) 1 Hy. Bl. 81.

³ *Mynn v. Joliffe*, (1834) 1 Mood. & R. 326.

⁴ *Sykes v. Giles*, (1839) 5 M. & W. 645; *Chapel v. Thornton*, (1828) 3 C. & P. 352; *Williams v. Millington*, (1788) 1 H. Bl. 81; *Williams v. Evans*, (1866) 35 L.J.Q.B. 111.

⁵ *Farrer v. Lacy*, (1885) 81 Ch. D. 42.

⁶ *Johnston v. Boyes*, (1899) 2 Ch. 72.

⁷ *Williams v. Evans*, (1866) L.R. 1 Q. B. 352; *Pape v. Westacott*, (1894) 1 Q. B. 272.

⁸ *Per Holt, C.J.*, in *Thorold v. Smith*, (1708) 11 Mod. 87; *Pape v. Westacott*, (1894) 1 Q. B. 272 C.A. as to a custom to receive bills of exchange; see *Williams v. Evans*; (1866) L.R. 1 Q. B. 352.

⁹ *Earl of Ferrers v. Robins*, (1832) 5 Cr. M. & R. 152; *Sykes v.*

Giles, (1839) 5 M. & W. 645; see for agent's authority to receive payment; *Catterall v. Hindle*, (1866), L.R., 1 C.P. 186; *Pape v. Westacott* (1894) 1 Q.B. 279 C.A. The legal presumption is that an agent to receive satisfaction of a money demand can only receive money, *Legge v. Byas*, (1901) 6 Com. Cas. 16.

¹⁰ *Bridges v. Garrett*, (1870) L.R. 5 C.P. 451; *Pearson v. Scott*, (1878) 9 Ch. D. 198.

¹¹ A custom to do so would be unreasonable and ineffective without the seller's consent, *Underwood v. Nicholls*, (1855) 17 C.B. 289; *Pearson v. Scott*, (1878) 9 Ch. D. 198; *Sweeting v. Pearce*, (1859) 7 C.B. N.S. 449.

¹² *Catterall v. Hindle*, (1864) 35 L.J.C.P. 161, if he does, the principal can sue the buyer for the whole price, *Legge v. Byas*, (1901) 6 Com. Cas. 16.

estopped¹ from disputing it and the seller and buyer may make such an arrangement.² Authority to receive payment.

If the auctioneer has received payment by cheque or bill of exchange without or in excess of any authority express or implied, the vendor is not bound by such payment. The purchaser still remains liable and the auctioneer may be sued by the vendor for any damages sustained by him.³ Bill of exchange.

An auctioneer has no implied authority to rescind a sale⁴ or in England to warrant.⁵ If he do so without authority, the vendor is not bound, though the auctioneer is liable to be personally sued for breach of warrant of authority.⁶ Authority to warrant.

Story⁷ says an auctioneer's verbal declarations at a sale at least where they do not contradict the particulars of sale are admissible against the principal and binding on him. There is authority that such statements are inadmissible to contradict the printed particulars or conditions.⁸ It has been held that an unauthorised but innocent misrepresentation was of no avail after completion of a sale of land.⁹ But in India the Privy Council¹⁰ has held that a purchaser is entitled to rely on statements made at a Court sale by the auctioneer, although they contradicted the written

¹ *Cooke v. Eshelby*, (1887) 12 A.C. 271; *George v. Clagett*, (1797) 4 R.R.462, 2 Smith's L.C. 11th Ed. 188; *Montagu v. Forwood*, (1893) 2 Q. B. 350 C.A. (1867) 36 L. J. C. P. 42; *Brady v. Todd*, (1861) 30 L.J. C.P. 223.

² *Payne v. Lord Leconfield*, (1882) 51, L.J. Q.B. 642.

³ p. 107.

⁴ *Bartlett v. Purnell*, (1836) 4 A. & E. 792.

⁵ *Sykes v. Giles*, (1839) 5 M. & W. 645.

⁶ *Nelson v. Aldridge*, (1818) 2 Stark. 485, 20, R.R. 709.

⁷ *Baldry v. Bates*, (1885) 52 L.T. 620; *Brooks v. Hassall*, (1883) 49 L.T. 569; *Howard v. Sheward*,

⁸ *Gunn v. Eshart*. 1 H. Bl. 289; *Powell v. Edmunds*, (1816) 12 East 6; *Ogilvie v. Foljambe*, (1817) 3 Mer. 53, 65.

⁹ *Brett v. Clouser*, 5 C.P.D. 876.

¹⁰ *Mahomed Kala Mia v. Harperink*, (1908) 36, I.A. 32.

conditions which were read out : the purchaser was unable to read these or to understand the reading.

Generally, the flowery language of an auctioneer in extolling the merits of the article on sale are all taken for what they are worth and so deceive no one.¹

Verbal statements by auctioneer.

Verbal statements by an auctioneer may or may not be part of the contract.

It not part of the contract, a material misrepresentation of fact will make the contract voidable,² and in the case of fraud, give the purchaser a cause of action against the auctioneer or vendor if a party to such fraud.

The auctioneer can verbally depart from the contract and make a valid sale if within his authority.³

Verbal Corrections.

Verbal corrections at the time of sale of misdescriptions in the particulars may defeat the purchaser's right to enforce specific performance with compensation.⁴

Misstatements by the auctioneer may make him liable to the vendor for loss suffered thereby⁵ or to an action by the purchaser for breach of warrant of authority.⁶

Termination of agency.

The agency is for sale by auction only, and therefore when the property has been knocked down the auctioneer's authority is at an end, except for the purpose of carrying out the contract made at auction.⁷ He cannot consent to rescind that contract⁸ nor can he vary it. The authority as at an end after receiving the deposit,⁹ *qua* auctioneer.

¹ *Jennings v. Broughton*, 17 Beav. 234; *Denton v. MacNeil*, L.R. 2 Eq. 352; *Smith v. Chadwich*, (1882) 20 Ch. D. 27, 9 A. C. 187.

² See *Mahomed Kala Mi v. Harperink*, (1908) 86 I.A. 32.

³ *Eden v Blake*, (1845) 13 M. & W. 614.

⁴ *Re Hare*, (1901) 1 Ch. 93.

⁵ *Parker v. Farebrother*, (1853) 1 C. L. R. 323.

⁶ *Anderson v. Croall*, (1908) 41 Sc. L. R. 95; *Cotton v. Bennett*, (1884) 28 Ch. D. 161.

⁷ *Seton v. Slade*, (1802) 7 Ves. 265, p. 276; *Blackburn v. Scholes*, (1810) 2 Camp. 341.

⁸ *Nelson v. Aldridge*, (1818) 2 Stark, 435.

⁹ *Seton v. Slade*, (1802) 7 Ves. 265; *Sykes v. Giles*, (1839) 5 M. & W. 645, *Mews v. Carr*, (1856) 1 H. & C. 484.

Until the property is finally knocked down the auctioneer's authority is revocable expressly or by any of the events which ordinarily terminate agencies,¹ unless the contract is such as to give the auctioneer an authority coupled with an interest.²

Revocation of authority.

The authority can be withdrawn even though the auctioneer has advertised the property for sale,³ and incurred expenses.⁴ If the auctioneer, after revocation of authority, insists on entering the vendor's premises for the purpose of the sale, he is liable to an action for trespass.⁴

If the authority had been revoked, the auctioneer could not give the highest bidder any right to the property even though the bidder did not know of the revocation,⁵ at Common Law. But in India this depends on section 108.⁶ But if after a bid is accepted, the seller sets up a restriction of the auctioneer's authority which was not disclosed at the time, the buyer's remedy is not against the auctioneer for breach of warranty of authority, but against the seller on a contract of sale.⁷

After revocation.

He cannot conclude a sale by private contract,⁸ although if the vendor accept a purchaser introduced by him and himself conclude the sale, the auctioneer is entitled to remuneration.⁹

Sale by private contract.

If the property has not reached its reserve and is bought in, an immediate sale at the reserve price to a person present at the biddings has been in some cases held good as an auction sale¹⁰; but, generally, his authority is only to

¹ Contract Act, s. 201; *Warlow v. Harrison*, (1859) 1 E. & E. p. 309.

² Contract Act, s. 202; *Charlesworth v. Mills*, (1892) A. C. 231.

³ *Warlow v. Harrison*, (1859) 1 E. & E. 295.

⁴ *Taplin v. Florence*, (1851) 10 C. B. 744.

⁵ *Mauser v. Back*, (1848) 6 Hare. 443.

⁶ See para. 476.

⁷ *Rainbow v. Hawkins*, (1904) 2 K. B. 322.

⁸ *Marsh v. Jelf*, (1862) 8 F. & F. 234.

⁹ *Green v. Bartlett*, (1863) 14 C. B. N. S. 681.

¹⁰ *Else v. Barnard*, (1860) 29 L.J. Ch. 729; *Bousfield v. Hodges*, (1863) 33 Beav. 90.

Right of
auctioneer
to buy.

sell by auction and not by private contract, even if after an abortive auction he is offered more than the reserve price.¹

It has been held in Madras that an auctioneer may buy the goods himself at the reserve price, if there is no fraud.² *Sed quare*, for section 215 of the Contract Act, illustration (a), which shows that an agent to sell may buy himself, is in conflict with the Trusts Act, II (of 1882), sections 53 and 54.

Pollock³ however, considers that section 215, though opposed to the English law, is sound in principle and that the Trusts Act only refers to trustees. It has been held in England that unless with the owner's full consent,⁴ an auctioneer cannot sell to himself⁵ or to a firm in which he is a partner,⁶ or to a company in which he is a shareholder.⁶

But as regards agents to sell, it has been held that consent must be proved or that the price paid was the full value, and this must be shown with the utmost clearness and beyond all reasonable doubts⁷ and, generally, an agent to sell cannot be permitted to be the buyer except in cases of the fairest and most open dealing.⁸ The question therefore turns on whether an auctioneer is an ordinary agent or must come under the Common

¹ *Daniel v. Adams*, (1764) Ambl. 495; *Marsh v. Jelf*, (1862) 3 F. & F. 234.

² *Maclean v. Vanlengen*, Mad. H. C. 1877; *Mayen v. Alston*, (1892) 16 M. 249, 265; distinguishing *Subbarayudu v. Kotayya*, (1891) 15 M. 389 (vakil employed to bid, but see Contract Act, s. 215 Illus. (a)).

³ Indian Contract Act, 2nd Ed. 560.

⁴ *McPherson v. Watt*, (1877) 3 A. C. 254.

⁵ *Baskett v. Cafe*, (1851) 4 De G. & Sm. 388.

⁶ *Salomons v. Ponder*, (1865) 34 L. J. Ex. 95.

⁷ *Charter v. Trevelyan*, (1844) 11 Cl. & F. p. 732.

⁸ *Mollett v. Robinson*, (1870) L. R. 5 C. P. p. 655; (1874) L. R. 7 H. L. 802; recently it was said such an agent can never be permitted to buy: *Weiner v. Smith*, (1910) 1 K. B. p. 291 C. A. See too *Kilson v. Hardwick*, (1872) L. R. 7 C. P. p. 478: cf. *DeBussche v. Alt*, (1878) 8 Ch. D. 286, where a custom for agents to buy at the minimum limit was disallowed as conducing to fraud.

Law doctrine¹ as to auctioneers and other special agents whose business it is to sell other people's goods. It seems that an auctioneer cannot buy himself.

In England in order to induce the Court to reopen biddings under the Sales of Land by Auction Act 1867, there must be either fraud or such misconduct as borders on fraud.²

Re-opening biddings.

This rule is applied to all auctions.³

When a vendor put up for sale by auction property described as an interest in a partnership, knowing that it was worth nothing, and it was bought by the purchaser in ignorance of the circumstances that rendered it of no value, the sale was set aside. The purchaser may know that the thing may be valueless, but if the seller knew that it was valueless, then it is fraud to retain the purchase money.⁴

Auction of valueless property.

If a sale has been actually completed, the purchaser has a right of action in England against a vendor for preventing the auctioneer from signing a contract of sale, and this is a right of action independent of the contract. But this is because he is thereby prevented from passing his contract under the Sale of Goods Act, and does not arise in India.

Vendor preventing signature of contract by auctioneer.

The auctioneer must display ordinary skill and knowledge as an auctioneer,⁵ and must follow the usual course of business recognised by custom or statute.⁶ He is liable to damages for breach of duty, nominal if no material injury result, and as compensation if material injury result.⁷

Auctioneer's rights and duties to vendor. Skill and knowledge.

¹ Which extends to factors: *Ex parte Hughes*, 6 Ves. 617, and *Commissioners in Bankruptcy Ex parte Bennett*, 10 Ves. 381.

² *Delves v. D.*, (1875) L. R. 20 Eq. 77.

³ Cf. Sale of Land by Auction Act (1867) s. 7 (English); *Brown v. Dalishott*, 88 L.J.C. 717; *Delves v. D.*, L. R. 20 Eq. 77.

⁴ *Smith v. Harrison*, 26 L. J. Ch. 412.

⁵ *Russell v. Hankey*, (1794) 6 Term. Rep. 12.

⁶ *Christie v. Cooper*, (1900) 2 Q. B. 522

⁷ *Hibbert v. Bayley*, (1860) 2 F. & F. 48; *Parker v. Farebrother*, (1853) 1 C. L. R. 323.

Neglect by the auctioneer to ascertain the reserved price before the commencement of a sale, is not improper conduct. In the case cited the price realised was the reserved price, and it was said others would have bid had they known that the reserve had been reached.¹

Bailee. As regards the custody of the goods the auctioneer is a bailee. He parts with the goods at his peril before the price is paid. He must redeliver to the vendor unless he has a lien, if the vendor is entitled to² possession.

Lien. Auctioneers have a lien by custom on goods entrusted to them for sale and on the deposits and purchase money for their charges and remuneration.³ This lien attaches to goods whether sold at the auctioneer's premises or at those of the vendor.³ It is a charge prior to any assignment of the sale proceeds by the vendor, and the auctioneer cannot be compelled to marshal the proceeds of several sales in order to give effect to the rights of an assignee of the purchase money of a certain sale.⁴

Can sue and be sued. And under the Contract Act he has a lien as bailee under section 170 and a right of retaining moneys received in the business of auctioneer for sums due to him and expenses under section 217, and of retaining the seller's goods and papers under section 221.

He can recover auction duty paid by him,⁵ as coming within section 69.

An auctioneer, by reason of his lien and special property can sue for the price of goods sold,⁶ and bring an action for trespass or trover in respect of goods in his hands,⁷

¹ *Brown v. Okshot*, (1869) 38 L. D. 192.
J. Ch. 717.

² *Brown v. Staton*, (1816) 2 Chitt. 353.

³ *Williams v. Millington*, (1788) 1 Hy. Bl. 81; *see* Contract Act, s. 170.

⁴ *Webb v. Smith*, (1885) 30 Ch.

⁵ *Foster v. Ley*, 2 Bing. N. C. 269; *Brittain v. Lloyd*, 14 M. & W. 762.

⁶ *Freeman v. Farrow*, (1886) 2 T. L. R. 547.

⁷ *Robinson v. Rutter*, (1855)

E. & B. 954.

and be sued for non-delivery. It is no defence to an auctioneer's suit for the price to plead payment to his employer¹ unless the conditions of sale so provide.

When an auctioneer received payment by cheque for goods sold and afterwards settled with the owner, he was held entitled to recover on the cheque, although the contract had been induced by fraud on the part of the owner, of which the auctioneer was unaware.²

Where goods are sold by auction, there is a distinct and separate sale of the goods in each lot, by which the ownership thereof is transferred as each lot is knocked down.

Section 122.
Sale and
transfer of
lots sold by
auction.

The Sale of Goods Act enacts a similar rule but it is only a *prima facie* rule,³ and doubtless in India the parties can make what contract they please.

In England even if there is a condition that the goods are not to be removed until payment, the buyer can nevertheless resell forthwith.⁴

The Indian section provides that the contract is complete as each lot is knocked down.⁵ The English Act is more precise. A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer or in other customary manner. Until such announcement is made any bidder may retract his bid.⁶

Completion
of sale.

This last rule was the same at Common Law,⁷ and is clearly law in India.

¹ See *Subrahmania v. Narayanan*, (1901) 24 M. 130; *Rajathna v. Narasimha*, 28 M. p. 303.

² *Hindle v. Brown*, (1908) 98 L. T., 791 C. A.; cf. *Sloddart v. Union Trust*, (1912) 1 K. B. 181, where the debtor was held not be entitled to set up as a defence against an assignee that the assigned debt arose out of a transaction voidable for fraud, but affirmed, or to set-off against the

debt damages for such fraud as against the assignee.

³ S. 58 (1); *James v. Short*, 1 Stark. 426; see *Dykes v. Blake*, (1888) 4 Bing. N. C. 468.

⁴ *Scott v. England*, (1844) 2 D. & L. 520, 69 R. R. 868.

⁵ Cf. illus. (b) to s. 86.

⁶ S. of G. Act, s. 58 (2).

⁷ *Payne v. Cave*, (1789) 3 T. R. 148, 1 R. R. 679; *Agra Bank v. Hamlin*, (1890) 14 M. 285.

Where a bid is accepted subject to the seller's sanction, the bid can still be withdrawn.¹ In this case a usage to the contrary was set up, but such a custom would seem to be invalid; there is no contract to which it can add a term, and it is contrary to the general principles of law.

Condition
not to with-
draw bids.

It seems that a condition that a bid shall not be retracted even if known to the bidder is inoperative,² for want of consideration, except where the bidder is a party to a contract embodying the conditions of sale.³

Conduct of
sale.

There are no special restrictions as to the time and place of sale.⁴ In England it should not be held on a Sunday,⁵ but semble that is not so in India. It ought not to be held at any place in contravention of the legal rights of another, as in a house in respect of which restrictive covenants against sales by auction exist,⁶ or so as to infringe market rights.⁷

Statutory
regulations.

There are no statutory regulations in India as in England,⁸ save as regards pretended biddings by the seller, which render the sale voidable at the buyer's option.⁹

Particulars &
conditions of
sale.

It is customary for the auctioneer to settle the particulars and conditions of sale in sales of goods, but not in sales of real property. If he undertakes to settle them, he is bound to use the skill and knowledge of a qualified auctioneer.¹⁰

¹ *Mackenzie Lyall v. Chamroo Sing*, (1889) 16 C. 702.

² See *Dart. V. & P.*, (1888) 6th Ed. I. 139; *Sugden V. & P.*, (1842) 14th Ed. 14; *Benj. 5th Ed.* 66.

³ *Freer v. Remner*, (1844) 14 Sim. 391 (a family arrangement for a sale, where the bidder was a party to a court sale).

⁴ *Keith v. Reid*, (1870) L. R. 2 Sc. Ap. 39.

⁵ *Fennell v. Ridler*, (1826) 5

B. & C. 406.

⁶ *Toleman v. Portbury*, (1872) L. R. 7 Q. B. 344.

⁷ *Elwes v. Payne*, (1879) 12 Ch. D. 468; *Abergavenny v. Straker*, (1889) 60 L. T. 756.

⁸ See *Laws of England Vol. I.* p. 506.

⁹ Section 123.

¹⁰ *Denew v. Daverell*, (1818) 3 Camp. 451.

Generally speaking, the conditions of sale are sufficiently communicated to the buyers if they are exhibited legibly in the auction room.¹ Communi-
cation of
conditions.

A rule that lots are to be cleared away within a fixed time, does make such removal a condition precedent to the buyer's right to delivery.²

A condition that no error or misstatement shall avoid a sale, but that there shall be a proportionate allowance will not in general save a sale where the error is material or substantial though not fraudulent³; at any rate any error or misstatement which might reasonably be supposed to have induced the purchaser to buy, will vitiate the sale; so too, if the abatement of price is not to be ascertained with reasonable accuracy,⁴ the sale cannot stand. Terms
against
errors
avoiding
sales.

Catching conditions such as the buyer could not readily apprehend or understand without legal advice will not bind.⁵ Catching
conditions.

The method of bidding and the amounts of bids are usually regulated by the conditions of sale. Until the property is actually knocked down there is no complete sale.⁶ A bid is a mere offer and can be retracted before the auctioneer announces the completion of the sale;⁷ until that time the vendor may also withdraw the property Bidding.

¹ *Mesnard v. Alridge*, (1801) 3 Esp 271; *Bywater v. Richardson*, (1834) 1 Ad. & E. 508; *Freme v. Wright*, (1819) 4 Madd. 364; *Torrance v. Bolton*, (1872) 8 Ch. Ap. 118.

² *Woolfe v. Horne*, (1877) 46 L.J.Q.B. 584.

³ *Duke of Norfolk v. Worthy*, (1808) 1 Camp. 340; *Flight v. Booth*, 1 Bing. N.C. 370; *Robinson v. Musgrove*, 8 C. & P. 469.

⁴ *Sherwood v. Robins*, 3 C. & P. 389.

⁵ *Dykes v. Blake*, (1838) 4

Bing. N. C. 463; cf *Dobell v. Hutchinson*, (1838) 3 A. & E. 355.

⁶ Contract Act s. 122; see p. 725.

⁷ S. of G. Act. s. 58 (2); *Payne v. Cave*, (1789) 3 T.R. 148; *Warlow v. Harrison*, (1858) 28 L.J.Q.B. p. 21. The ordinary condition of sale which negatives the bidder's right to retract his bid is, it seems, not enforceable. See Sugden V. & P. 14th Ed. 14; Dart. V. & P. ed. 1888, p. 139; Ed. Vol. 1, 136; Leake on Contracts, 5th Ed. Benjamin, p. 447.

from auction, provided that the sale is subject to a reserve which has not been reached.¹

Sale without reserve.

If the sale is without reserve, it is doubtful if the withdrawal of the property renders the vendor or the auctioneer, if the principal is not disclosed, liable to the highest bidder for damages on an implied undertaking that the sale is without reserve to the highest bidder.²

But it would seem that where the sale is without reserve, the property cannot be withdrawn after the first bid.³

Biddings by seller.

At Common Law it was held that a sale without reserve imported that there should be no bidding on behalf of the vendor, directly or indirectly; and any bidding by or for him would in such a case be fraudulent.⁴

Section 123. Effect of use by seller of pretended biddings to raise price.

If, at a sale by auction, the seller makes use of pretended biddings to raise the price, the sale is voidable at the option of the buyer.

So too the employment of "puffers" was always held fraudulent at Common Law,⁵ unless the conditions of sale provide for it.⁶

In India the law is wider, and if the seller makes use of pretended biddings to raise the price, the sale is voidable at the option of the buyer⁷ whether the sale is expressed to be without reserve or not. It would seem,⁸ however, that if there is an express reservation of the right by the seller to bid, the section would not apply.

¹ *McManus v. Fortescue*, (1907) 2 K. B. 1.

² See Law of England Vol. 1, p. 511 n. (r); Benj. 5th Ed. pp. 66, 484; *Warlow v. Harrison*, (1858) 1 E. & E. 295, 28 L. J. Q. B. 18.

³ *Warlow v. Harrison*, 28 L. J. Q. B. 18.

⁴ *Robinson v. Wall*, 2 Phill. 372, 16 L. J. C. 401; *Meadows v. Tanner*, 5 Madd. 34; cf. *Parht v. Jepson*, 46 L. J. C. P. 529 (bid by auc-

tioner for seller); *Bexwill v. Christie*, (1776) 2 Camp. 395, 1 Cow. p. 395; *Howard v. Castle*, (1796) 6 T. R. 642, and other cases cited by Benjamin 5th Ed. p. 488.

⁵ See cases cited above in n. 4.

⁶ S. of G. Act, s. 58 (3) (4.)

⁷ § 123 cf. *Greenwood v. Baverstock*, (1863) 14 C. B. N. S. 204; S. of G. Act, s. 58 (3).

⁸ S. of G. Act s. 58 (3).

In England there are three classes of auction sales :—

1. Sales without reserve: in such a case the employment of a puffer rendered the sale void.

2. Sales with a condition that the highest bidder shall be the purchaser, nothing being said about a reserve. This was deemed to be a sale without reserve.

3. Sales with a right expressly reserved to bid by or on behalf of the seller.

In England when the sale of land or goods is subject to a reserve price, or when the vendor reserves a right to bid or to employ persons to bid on his behalf, the fact must be notified before sale, and in the sale of land it must be expressly notified in the particulars and conditions of sale.¹ The rule in India is laid down in section 123.

Sales subject to a reserve and vendor's right to bid.

Fictitious bids made by third persons without the privity of the vendor or auctioneer do not invalidate the sale, nor do they affect the vendor's right to specific performance.²

Fictitious bids.

If two or more persons take part in a mock auction by means of sham bidders and bidding, to induce persons to buy at excessive prices, they are guilty of a criminal conspiracy according to English law,³ and of cheating in India.

Mock auctions.

Improper and fraudulent acts, which are likely to prevent the property put up from realising its fair value and to damp the sale, will invalidate any purchase by persons guilty of or privy to such acts, and will justify the auctioneer in withdrawing the property.⁴

Damping the sale.

In Sugden's *Vendors and Purchasers*, it was stated that if the parties agree not to bid against each other, the Court

Agreement not to bid against one another.

¹ Sale of Land by Auction Act, 1867, 30 & 31 Vict. c. 48, s. 5; Sale of Goods Act, s. 58.

² *Union Bank v. Munster*, (1887) 37 Ch. D. 51.

³ See *R. v. Lewis*, (1869) 11 Cox C. C. 404.

⁴ *Twining v. Morice*, (1788) 2 Bro. Ch. Cas. 326; *Mason v. Armistage*, (1806) 18 Ves. 25; *Fuller v. Abrahams*, (1821) 6 Moo. C. P. 816.

⁵ 18th Ed. p. 93.

could reopen the biddings. This was disapproved of in Carew's case¹ and the passage in Sugden was accordingly altered.²

It has been held in India that there is no authority in support of the position that dissuading bidders is necessarily an act of fraud,³ and it has been held that a combination of buyers at an auction not to bid against one "Knock out." another, even if it amount to a "knock out," does not give rise to a cause of action at the suit of the vendor.⁴

Such an agreement is however according to Chalmers a conspiracy at Common Law as well as a ground for avoiding the contract.⁵ The editors of Benjamin are of the same opinion and cite *Fuller v. Abrahams*.⁶ They add however that it is not necessarily a fraud for a man to persuade others not to bid against him.⁷ Leake only cites *Fuller v. Abrahams*,⁸ and states as its result that where a purchaser procures a sale to himself by fraudulently or wrongfully deterring other persons from bidding, the vendor may avoid the sale. There the purchaser addressed the company present saying he had a claim against the owner by whom he had been ill-used. The Court on a rule held the sale invalid.

¹ (1858) 26 Beav. 187, 28 L. J. Ch. 218.

² 14th Ed. p. 117. See too *Galton v. Emuss*, 1 Col. 243, 18 L. J. Ch. 388; Dart. on V. & P. p. 121; *Gobind Chundra Gango-padhya v. Sherajumissa*, 18 C. L. R. 1.

³ *Doorga Singh v. Sheo Pershad* (1889) 16 C. 194, bench; as to cases of sales in execution, see *Rukhinee Bulubh v. Brogonath*, (1879) 5 C. 308 (disparaging remarks by decree-holder).

⁴ *Jyoti Prokesh Nande v. Jhowmull*, (1908) 86 C. 134, following *Doolubdass Petamberdass v. Ram-*

lohl, (1850) 15 Jur. 257, 5 Moo. I.A. 109; see too *Hari Balkrishna v. Naro*, 18 B. 342; *Doorga Singh v. Sheo Pershad*, 16 C. 194 and *Laws of England* Vol. I. 512. *Heffer v. Martyn*, (1867) 36 L. J. Ch. 372.

⁵ Chalmers 5 Ed. p. 119, citing Leake of 'Contracts' 3rd Ed. p. 308.

⁶ (1821) 3 B. & B. 116, 6 Moo. C. P. 316.

⁷ *Galton v. Emuss*, (1844) 13 L. J. Ch. 388; *In re Carew* (1858) L. J. Ch. 218; *Heffer v. Martyn*, (1867) 36 L. J. Ch. 372.

⁸ (1821) 3 B. & B. 116.

In America the law is that if the intention is to shut out competition and depress the sale, in order to get the property at a sacrifice, it is fraud, otherwise not¹; a similar view of the law has been recently taken in India.² It was held that there is nothing necessarily unlawful in two or more persons agreeing not to bid against one another. It is the end to be accomplished which determines if the combination is lawful or otherwise : if the object is to depress the price by artifice, the purchase will be void (*semble voidable*). If it be to divide the property for the accommodation of the purchasers, it will be valid.³

American rule.

Same in India.

Knock out.

The true criterion seems to be the presence or absence of fraud, which is a term purposely left vague by the courts.

If a purchaser procure a sale to himself by wrongfully or fraudulently deterring other persons from bidding, the vendor may avoid the sale.⁴

Purchaser deterring biddings.

So where the purchaser employed the vendor's agent to bid for him which deterred the persons present from bidding who supposed him to be bidding for the vendor, specific performance was refused.⁵

The advertisement of an auction is merely an intimation of an intention to sell, and in absence of fraud intending purchasers who attend the auction, have no right of action if the property is not put up for sale, even if they have incurred expenses in order to be present.⁶ If the advertisement however amounts to a representation that the auctioneer is authorised to sell, and this representation is fraudulent, persons incurring expenses relying on it can sue the auctioneer in tort.⁷

Advertisement of auction.

¹ *Kearney v. Taylor*, (1853) 15 How. 494.

² Not cited in *Jyoti Prokesh v. Jhowmull*, *supra*,

³ *Gobindo Chandra Jha v. Shyam Lal Jha*, (1905) 1 C.L.J. 85 (bench), where the cases are considered.

⁴ *Fuller v. Abrahams*, 3 Br. & B. 116.

⁵ *Twining v. Morrice*, (1788) 2 Bro. C. C. 826.

⁶ *Harris v. Nickerson*, (1873) L.R. 8 Q.B. 286.

⁷ *Richardson v. Silvester*, (1873) L.R. 9 Q.B. 84.

Harris v. Nickersons was a case of an advertisement of an ordinary auction which, it seems, is on the same basis as an advertisement for tenders, which does not bind the advertiser to accept any tender, there being no offer from him, but the offer coming from the tenderer.¹

Sales without reserve.

When a sale by auction has been announced as being without reserve, it apparently amounted at Common Law to an offer² of a contract with the highest *bonâ fide* bidder and is accepted by his bid. This was the view taken in *Warlow v. Harrison*.³ In such a case, however, the auctioneer acting for an undisclosed principal does not, it seems, offer to contract personally. In *Warlow v. Harrison* the view taken was that he did so offer, which however has been doubted.⁴ But the provision in the Code that the contract is made as each lot is knocked down, negatives any idea of there being any previous contract.⁵ But there may be, once the goods are put up, an implied contract not to withdraw them.⁶

There is a difficulty in such cases of proving consideration for any alleged contract.⁷

Mistaken biddings.

Where a bidder at an auction is mistaken as to the identity of the property which he purchases, the Court

¹ *Spencer v. Harding*, (1870) L. R. 5 C. P. 563; *McManus v. Fortescue*, (1907) 2 K.B.1.

² A simple declaration of an existing intention to sell is not enough: *Carlill v. Carbolic Soap Co.*, (1893) 1 Q. B. p. 268; see *Canning v. Farquhar*, (1886) 16 Q.B.D. 727.

³ *Warlow v. Harrison*, (1859) 29 L.J.Q.B. 15; followed on this point *Re Agra and Mastersman's Bank* (1867) 2 Ch. Ap. 397; *Johnston v. Boyes*, (1899) 2 Ch. 73; see *Spencer v. Harding*, (1870) L. R. 5 C. P. 563; cf. *Harris v. Nickerson*, (1873) L. R. 8 Q. B.

p. 288.

⁴ *Mainprice v. Westley*, (1865) 6 B. & S. p. 429, where *Warlow v. Harrison* was distinguished as the principal was disclosed, which has since been held immaterial; *Rainbow v. Hawkins*, (1904) 2 K.B. 322.

⁵ See *Fenwick v. Macdonald*, (1904) 41 Sc. L.R. 688, on similar words in S. of G. Act s. 58.

⁶ *Johnston v. Boyes*, (1899) 2 Ch. p. 77.

⁷ See *Cooke v. Oxley*, (1790) 3 T. R. 653; but see *Denton v. G. N. R.*, (1856) 25 L.J.Q.B. 129.

may refuse specific performance at the instance of the vendor, and award him damages¹; but if the mistake is owing to the buyer's carelessness, specific performance has been granted.²

Where a property was advertised for sale absolutely, and at the auction conditions were produced and read relating to a mortgage, a purchaser without notice of the mortgage was held entitled to rescind his contract.³ And the Privy Council in a case where a buyer at a Court sale relied on statements made by the auctioneer, set aside a sale as the buyer purchased under a misapprehension induced by such statements.⁴

In absence of special agreement the auctioneer receives a deposit as stakeholder⁵ and must deliver it to the proper party at his peril⁶. But he is so far the vendor's agent, that the loss of the deposit by his insolvency or misconduct will fall on the vendor.⁷

Even if a deposit or part-payment is made to the seller's solicitor, it has been held that the buyer must bring a suit to recover his money (the sale having gone off owing to the seller's default) against the auctioneer as stakeholder, and not against the solicitor.⁸

When adverse claims are made to goods or money in the hands of an auctioneer he may interplead. If two auctioneers claim commission on the same sale, the purchaser cannot as a rule interplead.⁹

¹ *Malins v. Freeman*, (1835) 2 Keen; 25 4 L. J. Ch. 133; *Van Praagh v. Everidge*, (1903) 1 Ch. 434, 72 L.J. Ch. 260.

² *Tamplin v. James*, 15 C. D. 215 see Specific Relief Act S. 28.

³ *Torrence v. Bolton*, L.R. 8 Ch. 118, (1873) 42 L.J. Ch. 177.

⁴ *Mahomed Kala Mea v. Harperink*, (1908) 36 I.A. 32.

⁵ *Harington v. Hoggart*, (1830) 1 B. & Ad. 577; *Gray v. Gutteridge*, (1827) 3 C. & P. 40, 31 R.R. 343;

Edwards v. Hodding, (1814) 5 Taunt. 815, 15 R.R. 664.

⁶ *Burrough v. Skinner*, (1770) 5 Burr. 2639; *Furtado v. Lumley*, (1890) 54 J. P. 407; *Stevens v. Legh*, (1853) 2 C.L.R. 251 (Eng.).

⁷ *Rowe v. May*, (1854) 18 Beav. 613; see *Marlon v. Roche*, (1835) 53 L. T. 946.

⁸ *Ellis v. Gorton*, (1893) 1 Q.B. 350; *Edgell v. Day*, L.R. 1 C.P. 80.

⁹ *Greatorox v. Shackle*, (1895) 2 Q.B. 249.

Auction sale
evidence of
value.

Failure to
pay on day
fixed.

The price obtained at an auction sale has been taken as *prima facie* evidence of the full market value.¹

If the buyer fails to pay at the time agreed, the seller cannot rescind the contract unless time is of the essence of the contract.² It would seem that *prima facie* time for payment is not of the essence of a contract for sale.³ So where the plaintiff bought goods at auction, one of the conditions of sale being that all lots should be cleared within three days, and he came two days late and found the goods were resold, it was held he could sue for non-delivery.⁴

Proof.

If a sale by auction is followed by a written contract, the writing cannot be explained, or added to, or varied by parol evidence of what passed at the sale, and if the contract is signed referring to the particulars and conditions of sale, evidence is not admissible to show that the auctioneer at the time of the sale made oral statements in explanation or in alteration of the particulars or conditions,⁵ as a statement that the timber growing on the estate was to be taken at a valuation⁶ or was of a certain quantity.⁷

¹ *Shelly v. Nash*, 3 Madd. 232 ;
Fox v. Wright, 6 Madd. 111.

² S. 55 cf. S. of G. Act, s. 10.

³ *Martingale v. Smith*, (1841)
1 Q. B. 389 ; *Mersey Steel Co. v.*
Naylor, (1884) 9 A.C. p. 444.

⁴ *Woolfe v. Horne*, (1877) L.R.
2 Q.B.D. 355.

⁵ *Gunnis v. Erhart*, 1 H.B.L.
289 ; *Shelton v. Livius*, 2 C. & J.
411, 1 L.J. Ex. 139.

⁶ *Clowes v. Higginson*, 1 V. &
B. 524.

⁷ *Powell v. Edmunds*, (1810) 12
East. 6.

Addenda et Corrigenda.

§ 2, page 4, note 1.—But for contrary view see *Jeewansai v. Manordas*, (1910) 35 B. 199, O. C. Dandapat not affected by T. P. Act.

§ 11, page 12, add to note 2.—It must be proved as a fact: *Conchi v. Marrietta*, 40 Ch. D. p. 550, and pleaded as a fact: *Benham v. Earl of Mornington*, 3 C. B. 188. For method of proof see *Duchess De Sora v. Phillips*, 10 H.L.C. 653; *Nelson v. Bridport*, 8 Beav. 527, 534. It must be proved by qualified witnesses, not necessarily by a judge or advocate: *The Sussex Peerage Case*, 11 C. & F. 184, but also by a merchant: *Clegg v. Levy*, 3 Camp. 166, or counsel's certificate: *Re Dormey* 3 Hagg. Eccl. 767; *Re Klingemann*, 3 S. & T. 18, but not by a person with mere book knowledge: *In re Bonelli*, 1 P.D. 69; see too *Bristow v. Sequiville*, 5 Ex. 275; *Smith v. Gould*, 4 Moo. P. C. C. 21. For the power of English Courts to submit cases for opinion to Colonial Courts, see 22 & 23 Vict. C. 63, and to Foreign Courts, 24 Vict. C. 11; *Lord v. Colvin*, 1 D. & S. 24. Proof of foreign law.

§ 11, page 12, add to note 3.—The presumption is that it is the same as the *lex fori*: *Dimeck v. Corlett*, (1858) 2 Moo. P. C., p. 224; *Smith v. Gould*, 4 Moo. P. C. C. 21; *Brown v. Gracey*, 1 D. & R. N. P. 418; see *Bonnaud v. Charriot*, (1905) 82 C. 631, 9 C. W. N. 394 (burden of proving domicile). Presumed to be same as *lex fori*.

§ 12, page 12, add to note 4.—So a French prodigal cannot contract in India though he can in England: *Re Selot's Trust*, (1902) 1 Ch. 483. Personal capacity. French prodigal.

§ 18, page 19, add to note 5.—But the *lex loci contractus* is also considered: *Moore v. Harris*, (1876) L. R. 1 A. C. 318; *P. O. v. Shand*, (1863) 3 Moo. P. C. N. S. 272; the law of the flag was not referred to on appeal in *In re Missouri S. S. Co.*, (1889) 42 Ch. D. 321. Bill of lading.

§ 20, page 20, note 8.—See too *Haji Ismail Sait v. Messageries Maritimes*, (1905) 28 M. 400.

Page 23, add to note 8.—But see *Saxby v. Fulton*, (1909) 2 K.B. 208 (money lent to gamble in a country where it was not illegal, can be recovered in England).

§ 26, page 28, note 2.—The *lex fori* governs set-off and compensation: *Story*, s. 575; *MacFarlane v. Norris*, 2 B. & S. 783; *Allen v. Kemble*, 6 Moo. P. C. 314; *Rouquette v. Overmann*, 10 L. R. Q. B. 541; and liens and priorities of satisfaction: *Maspous y Hermans v. Mildred*, 9 Q. B. D. 580, 545. Set-off damages.

Liens; priorities.

Ordinary meaning.

§ 30, page 32, add to note 2.—Said to be the golden rule: *Harding v. Prece*, (1882) 9 Q. B. D. p. 292.

Indian contracts.

§ 32, page 34, note 3.—Contracts of the people of India ought to be liberally construed. The form of expression, the literal sense, is not to be so much regarded as the real meaning of the parties: *Narain Chandra Mukerji v. Mohendra N. Mukerji*, (1912) 15 C. L. J. 832; *Hunoomanpesaud Panday's case*, (1856) 6 M. I. A. 398, 411.

Uniformity.

§ 34, add at end, page 39, line 2.—See per Jenkins, C. J., in *Kashiram v. Pandu*, (1902) 27 B., p. 12 (unanimity between the several courts in India is desirable where local considerations do not call for different results).

Stare decisis.

§ 35, page 36, add to note 1.—Jenkins, C.J., said the principle outside the realm of property law loses much of its importance: *Kashiram v. Pandu*, (1902) 27 B., p. 12; but semble it is of extreme importance in commercial matters.

Previous decisions.

§ 35, page 36, note 1.—But the generality of expression in a case is governed by the particular facts: *Lalit Mohun Das v. Radharaman*, 15 C. W. N., p. 1025, follows *Quin v. Leathem*, (1901) A. C., p. 506.

Contra proferentem.

§ 41, page 43, note 9.—See *Norman Bennington*, 25 Q. R. D., p. 477. The rule *contra proferentem* only applies to words of doubtful import which are construed against the person by whom they may be considered to have been used: *Neill v. Whitworth*, 34 L.J.C.P. 155; cf. *S.E.R. v. Associated Portland Cement Co.*, (1910) 1 Ch. 12 C.A.; unless made clear by other parts of the document or the surrounding circumstances, or by custom: *Bullen v. Denning*, 5 B. & C. 842; *Ireland v. Livingstone*, L. R. 5 H. L. 395. Who is considered to have used the phrase is to be gathered from the circumstances: *Neill v. Whitworth*, 34 L. J. C. P. 155; and it may not be possible to say that it was used by one more than the other: *Borrell v. Dryer*, 9 A. C. 345; but see *Lawrence v. Aberdeen*, 5 B. & Ald. 107.

Who is within the rule.

§ 44, page 48, add to note 8.—*Russell v. Phillips*, 18 Q.B. 891, 901; *Hire Purchase Co. v. Rickens*, 20 Q. B. D. 387.

Exceptions ambiguous.

§ 46, page 48, add at end of § 46.—If no legal interpretation of an exception is possible, the liability remains as under the general law, for a Common Law liability is not excluded by an ambiguous exception: *Nelson Line v. Nelson*, (1907) 18 Com. Cas. 104.

Printed clauses.

§ 50, note 2.—For in using printed forms the practice is to allow clauses which are usual to stand though they may not altogether apply, rather than to strike them out or recast them: *Cunard S.S. Co. v. Marten*, (1902) 2 K. B. 624, (1908) 2 K. B. 511.

§ 55, at end, page 55, line 2.—Erasures and alterations of printed clauses are sometimes looked at : *London Transport Co. v. Trechmann*, (1904) 1 K. B. 635. **Erasures.**

§ 60, page 57.—The rule against parol evidence only applies if the parties agreed or intended that what was written should be their agreement: *Harris v. Rickett*, 4 H. & N., p. 7. Hence it may be shown that the parties were not to be bound until an event: *Pym v. Campbell*, 6 E. & B. 370; or that the writing was not intended to contain the whole contract and that there were other oral (*Harris v. Rickett*, 4 H. & N. 1; *Jervis v. Berridge*, L. R. 8 Ch. 351) or written terms (*Edwards v. Aberayron*, 1 Q. B. D., p. 588). **Parol evidence.**

§ 61, page 58, add to note 1.—*Bagot v. Chapman*, (1907) 2 Ch. 222; *Carlisle & Cumberland Bk. v. Bragg*, (1911) 1 K.B. 489 (guarantee described as an insurance paper). Such contracts are void; if the misrepresentation is as to the legal effect or contents, they are voidable: *Lloyd v. Grace*, (1911) 2 K. B. 489; *Howatson v. Webb*, (1908) 1 Ch. 1. **Non est factum.**

§ 61, page 58, add to end of § 61.—An antecedent agreement to take a bill cannot, if the contract stipulates for cash payment be proved: *Henderson v. Arthur*, (1907) 1 K. B. 10, 18. **Antecedent agreement.**

§ 62, page 58, add to note 11.—See the whole subject neatly summarised by Scrutton J., in *Lazarus v. Cairn Line*, (1912) 17 Com. Cas. 107. See too *Torreus v. Walker*, (1906) 2 Ch. p. 172 (necessity of notice implied, which must be given by the other party and not be received *allunde*). **Implied terms.**

§ 63, page 61, note 5.—Reversed in H. of L. *Att.-Gen. v. City of Dublin Steam Packet Co.*, (1909) 25 T. L. R. 696.

§ 63, page 64, add to line 3.—Nothing will be implied beyond the reasonable necessity of the case: *Att.-Gen. v. City of Dublin*, (1909) 25 T.L.R. 696 H.L. (implied duty to allow reasonably necessary facilities); *Biddell v. Clemens*, (1911) 1 K. B., p. 958 (implication that the parties will do what is mercantilely reasonable).

§ 78, page 77, note 1.—In dealing with a usage in Scotland, as to paying dues, the H. of L. held that as against a plain Statutory law no usage can prevail; an ancient custom might explain an ambiguous statute: *Lord Advocate v. Walker Trustees*, (1912) 23 T. L. R. p. 103. **Usage against a statute.**

§ 79, page 81, add to note 4.—But see *Cuthbert v. Cumming*, (1855) 24 L. J. Ex. 198, where the language in *Brown v. Byrne* was explained; the custom cannot control the contract save by explaining it. **Explaining a contract.**

Unknown custom.

§ 81, page 86, add to note 2.—Scrutton (on Bills of Lading) suggests that parties ignorant of customs are not bound if something is sought to be added to a contract or its essential character is sought to be altered, accus if the custom is to explain a term.

Opinion evidence of special meanings.

§ 90, page 95, add to note 2.—It has been held that mere opinions as to the special meaning of words is not sufficient: *Birrell v. Dryer*, 9 A. C., p. 846; *Levy v. Merchants Marine Ins. Co.*, 52 L.T. 263; *Carter v. Creek*, 28 L.J. Ex. 288; even if the words are of doubtful import: *Bowes v. Shand*, 2 A. C. 455; *Cross v. Eglen*, 2 B. & Ad. 106.

Absurdity in statute.

§ 93, page 101, add at end of § 93.—As to absurdities in statutes, see *Cargo ex "Argos"* (1872) L. R. 5 P. C., p. 188.

§ 103, page 109, line 2-3.—For "the chapter on" read "a contract for."

§ 105, page 110, note 2.—See *Wertheim v. Chicoutimi*, (1911) A. C. 801 P. C.

Right to damages.

§ 107, add at bottom of page 112.—A contract is assignable although not so expressed: *Tolhurst v. Associated Cement Manufacturers*, (1908) A. C. 414; assignment coupled with the liquidation of the assigning company does not determine a contract: *ibid.* per C. A. (1902) 2 K. B., p. 673. But a mere right to damages is not transferable: *Abu Mahamed v. S. C. Chunder*, (1909) 13 C. W. N. 384, 36 C. 345 C. A., Fletcher J., *dubitante*. But even if not assignable, the defendant cannot object if both the assignor and assignee sue: *Jewan Vurjung v. Haji Osman*, (1908) 5 Bom. L.R. 373; *Tod v. Lakmedas*, (1892) 16 B. 441.

Where assignor joins in the suit.**Tenders.**

§ 108, page 117, add to end of § 108.—Where the agreement was to sell for the highest net money tender, an offer to pay £200 more than the highest tender was held not to be the highest money tender: *South Hetton Coal Co. v. Haswell*, (1898) 1 Ch. 465 C.A. A call for tenders for all requirements estimated at 500—750 tons, does not give a right of suit on the tender being accepted: *Berk v. International Explosives Co.*, (1902) 7 Com. Cas. 20. But see *Att.-Gen. v. Stewards*, (1902) 18 T. L. R. 181 H. L., where a tender of so much or such quantity as required was accepted and the buyer made other arrangements, it was held the seller had no right to sue. But the doubts expressed in the judgments show that there might be a contract for a certain quantity or to supply goods for a specified purpose, and that then both parties would be bound.

Highest net money tender.**Price.**

§ 120, page 125, note 1.—Benj. 15th Ed., page 3, says, the price must be in money, which is doubtless correct.

§ 124, page 127, note 4.—A deposit can be recovered after rightfult rescission though in the hands of a stake-holder : *Hall v. Burnell*, (1911) 2 Ch. 551. **Deposit.**

§ 128, page 129.—As to the rights of co-owners in England, see *Chalmers*, 7th Ed., p. 72 ; *Lindley on Partnership*, 7th Ed., pp. 38—38 ; *Nyberg v. Handelaurl*, (1902) 2 Q. B. 202. **Co-owners.**

§ 137, page 136, note 1.—Cf. *Cooper v. Shepherd*, (1846) 3 C. B. 266 (satisfied judgment in trover), but it depends on whether the damages are for the full value ; *Benj.* 5th Ed. 94 : *Chinery v. Viall*, (1860) 29 L. J. Ex. 180 ; *Morris v. Robinson*, (1824) 3 B. & C., pp. 206, 207. An unsatisfied judgment does not pass the property. An ordinary unsatisfied judgment for damages, (*Brinsmead v. Harrison*, L. R., 7 C. P., pp. 547, 554) or in detinue does not pass the property, but an unsatisfied decree for the price does : *Bradley v. Ramsay*, (1912) 28 T. L. R. 383 C. A. ; so if the seller's bailee obtains satisfaction under a judgment from a wrong doer, the property passes : *The Wingfield*, (1902) P., p. 60. **Property passing by judgment.**
Unsatisfied.
By seller's bailee.

Note 3.—For the limitations to this, see *Bonnett v. Francis*, (1801) 2 B. & P. 550 (only where defendant has sold the goods, or admitted the plaintiff's title to sue in contract) ; *Nicol v. Hennessy*, (1896) 1 Com. Cas. 410. But waiver must be clear : *Smith v. Baker*, (1878) L. R. 8 C. P. 355.

§ 145, page 143.—The property may pass under a void contract : *Valentini v. Canali*, (1889) 24 Q. B. D. 166, or a voidable contract, see § 439, or under an illegal, executed contract : *Simpson v. Nichols*, (1838) 3 M. & W., p. 244, 5 M. & W. 702 n. ; *Scarfe v. Morgan*, (1888) 4 M. & W., p. 281 ; *Ayers v. S. Aust. Bk. Co.*, (1871) L. R. 8 P. C., p. 559 ; *Benj.* 5th Ed., p. 502 ; but the buyer cannot be sued for the price. **Under void contract.**
Illegal contract.

§ 157, page 158, line 7.—While the option to return lasts, the party in possession is a bailee. The liability is not limited to cases where there is an intention to adopt the transfer of the goods. It is sufficient if the defendant knowingly did an act which made the return impossible. Probably delivery to a third party for sale or return is acceptance : *Genn v. Winkel*, (1912) 28 T. L. R. 483 C. A. Non-return within a reasonable time is acceptance : *Marsh v. Hughes Hallet*, (1900) 16 T. L. R. 376. Probably a refusal to pay the price asked ends the contract : *Bradley v. Ramsay*, (1912) 28 T. L. R. 388 C. A. **Sale or return.**

§ 159, page 161, add to end of § 159.—A demand for the return of the goods does not end a hire purchase agreement nor take the goods out of the apparent ownership of the hirer ; *Hackney* **A demand for return in hire purchase agreements.**

Furnishing Co. v. Watts, (1912) 106 L. T. 676, disapproving *London Furnishing Co. v. Solomon*, 28 T. L. R. 265.

§ 162, page 163, line 13.—For “specified” read “ascertained if not specific”; and for “specific” in marginal note to § 162 read “ascertained.”

§ 177, page 182, line 10.—Delete “the buyer of.”

Party may
authorise
invalid
condition.
Documents
pledged.
Not a valid
tender.

§ 198, page 204, note 4.—Even if a condition subsequently imposed by one party is not authorised by the contract, the other party if he does not object to it, authorises it. So where the contract was for acceptances against bills of lading, and the seller pledged the bills of lading, it was held that the buyer might have refused to accept the bills of exchange unless the bills of lading were given up to him, but as he did not, he authorised the proceeding : *Gilbert v. Guignon*, (1872) 8 Ch. A. 16.

Bill of
exchange for
too large a
sum.

In such a case the buyer could not have acquired any title to the bills of lading by taking possession of them, for where bills of lading with bills of exchange for a larger amount than the contract price were sent to the seller's agents and tendered to the buyer, it was held that this was a valid reservation of the *jus disponendi*, and the buyer had no title to the bills of lading unless he accepted the excessive bills of exchange : per Kelly, C. B., in *Shepherd v. Harrison*, (1871) 4 Q. B. 498, affirmed in H. L. 5 E. & I. Ap. 116.

Mate's
receipts in
blank.

§ 199, page 206, note 1.—The right exists even if mate's receipts are taken by the seller in blank, and retained by him : *Schuster v. McKellar*, (1857) 26 L. J. Q. B. 281, 286.

Where master
no authority
to sign in
seller's name.

§ 201, page 207.—The right of control exists even if the master exceeds his authority in signing a bill of lading in the seller's name : *Van Casteel v. Booker*, 2 Ex. 691 ; *Turner v. Trustees of Liverpool Dock*, 6 Ex. 543, 549 ; *Ellershaw v. Magniac*, 6 Ex. 570 ; *Ogg v. Shuter*, 1 C. P. D. 47. But the form of the bill is not conclusive : *Brown v. North*, 8 Ex. 1.

Add to § 208.—But the decision in *Shepherd v. Harrison*, L. R. 5 H. L. 116, made no distinction between the two cases and has been said to have laid down what was enacted by section 19, sub-section 3 of the Sale of Goods Act : *Cahn v. Pockett*, (1899) 1 Q. B., p. 656.

§ 234, page 230, line 27.—For “property” read “properly.”

Delivery
order not
negotiable.

§ 251, page 245, note 2.—A delivery order is not a negotiable instrument so as to enable a holder to sue for damages : *Gilbertson v. Anderson*, (1902) 18 T. L. R. 224. A pledge of a delivery order relating to non-existent goods, is unavailing : *ibid.*, p. 226.

Pledged.

Carriers.

§ 258, page 251, note 2.—See as to the position of carriers : *The British & Foreign Marine Ins. Co. v. I.G.N. & Ry. Co.*, (1910) 15 C.W.N. 226.

§ 262, page 253, note 12.—If a through bill of lading is necessary it must be to the ultimate destination : *Landauer v. Craven*, (1912) 17 Com. C. 193. As to the necessity of tendering "perfect documents" see *Re Salomon*, (1900) 81 L. T. 825 (erasures). In a contract C.I.F., if the seller does not ship the correct quantity and gives no notice of shipment, and there is no appropriation such as to prevent him tendering other goods, the property does not pass : *Harland & Wolff v. Burstall*, (1901) 6 Com. Cas. 118, 84 L. T. 321, 17 T. L. R. 388 ; but whether the property passed or not, the buyer cannot claim the benefit of a profit insurance effected by the seller on his own behalf : *ibid.*

Through bill.

Perfect documents.

C. I. F.

Passing of property.

§ 286, add on page 273, after line 21.—The case seems, however, to depend on whether the tender was rejected ; it has been held that a party repudiating on one ground, cannot in Court set up that he was justified in doing so on another ground, but then there was, it seems, a waiver of the second objection, as it might have been and was not taken before : *Prested Miners Gas Co. v. Garner*, (1910) 2 K. B. 776. It was held in *Wright's case*, (1871) L. R. 7 Ch. 55, that the mutual rescission of a contract could be supported as against the seller's creditors on the ground of fraud subsequently discovered by the buyer.

Waiver of objection.

§ 298, page 281, note 7.—An agent to receive a money payment is presumed to have authority to receive money only, and if he accepts a less amount, allowing a set-off for a debt due by him to the debtor, that is not within his authority and the debtor is still liable in full to the creditor : *Legge v. Byas*, (1901) 6 Com. Cas. 16.

Authority *prima facie* to receive money only.

§ 300, add to end of page 283.—Acceptance of a cheque in payment of a secured advance is only conditional payment. If the security is then insisted on, an indemnity against the cheque may have to be given : *Re Defries*, (1909) 2 Ch. 423. The reason why giving and accepting a negotiable instrument suspends the seller's remedy is that an agreement so to suspend it is implied by law therefrom, but this implication does not arise where, if it did, the plaintiff would be deprived of a better remedy than an action on the bill, as distress for rent, or an action on a bond : *Henderson v. Arthur*, (1907) 1 K. B. 10, 18. Where a written contract stipulates for cash, an antecedent verbal agreement to take a bill cannot be proved : *ibid.*

Reason why taking bill suspends remedy.

§ 312, add at bottom of page 289.—There may be a qualified agreement to pay, *e.g.*, out of a specified fund, or in a particular manner when the relation of creditor and debtor is not constituted. But this does not apply when the mode of payment is prescribed, but the debtor is responsible for any deficiency : *Ram Narain Singh v. Odendra*, (1911) 15 C. L. J., p. 21.

Qualified agreement to pay.

Set-off of assigned debt.

§ 318, page 292.—A party can set-off an assigned debt: *Bennett v. White*, (1910) 2 K. B. 648.

Lien by express agreement.

§ 331, page 299.—There may be a lien by express agreement and such is something over and above the rights of an unpaid vendor: *Adelphi Bk. v. Halifax Co.*, (1887) 4 T. L. R. 21.

§ 371, page 330, note 1.—*Bunney v. Poyntz*, was held to be overruled in *Re Defries*, (1909) 2 Ch. 423.

§ 374, page 334, note 1.—*König v. Brandt*, (1901) 84 L. T. 748 C. A. (bills drawn against goods, no specific appropriation).

When bill of lading is spent.

§ 422, page 379, note 7.—A bill of lading cannot be said to be spent or exhausted until the goods covered thereby are placed under the absolute dominion and control of the consignees: *Chartered Bank of India v. British I.S.N. Co.*, (1909) A. C. 869 P. C. 13 C. W. N., p. 789; *Sanders v. Maclean*, (1883) 11 Q. B. D., p. 841.

§ 438, page 397, note 1.—In such a case the seller has a special property in the goods, good against any wrongdoer: *The Wingfield*, (1902) P. 42.

Deposit must be accounted for in suit on re-sale.

§ 450, page 405.—But in a suit for damages on resale, the amount of any deposit must be brought into account: *Ockenden v. Henly*, (1858) 27 L. J. Q. B. 861.

Agent with limited authority.

§ 466, page 424, note 3.—See *Fry & Morgan v. Smellie*, (1912) 106 L. T. 404 C. A., where it was held if a person intrusted with the indicia of title is given limited authority to deal with the goods (share-), any one dealing with him in good faith and in ignorance of the limitation, is not affected thereby, even if the indicia include a blank transfer form that does not put him on enquiry, secus if the holder has no authority to deal with the goods as a mortgagee (*France v. Clark*, 22 Ch. D. 880). Estoppel depends on the conduct of the owner: it is an equitable estoppel by representation, which is the one survival of the doctrine of making representations good (page 408), and usage may make any document a representation (page 409), citing *Colonial Bank v. Cady*, 15 A. C., p. 274.

Blank form.

Making representation good.

Usage.

§ 481, page 442, note 2.—But that case related to land. An executor in possession of goods would be within s. 108, Ex. 3: *Whitehorn v. Davidson*, was followed in *Bradley v. Ramsay*, (1911) 28 T. L. R. 13.

Bill of lading to seller's order not transferable.

§ 484, page 445, note 2.—If a bill of lading makes the goods deliverable to the vendor or assigns, or to order or assigns, the right of control is reserved to the vendor, and the bill is not transferable until it is endorsed: *Brandt v. Bowlby*, (1831) 2 B. & Ad. 932; *MacLachlan on Merchant Shipping*, 5th Ed., p. 687. See *Mitchell v. Ede*, (1840) 11 A. & E. 888 (qualified endorsement).

§ 486, page 451, note 1.—In *Maung Aung Pu v. Maung*, **Good Faith.** (1912) 12 India Cases, 809, it was held good faith is not defined in the Contract Act and the General Clauses Act does not apply; the civil law is a practical guide, and it does not include that which is done without the care or caution expected of a man of ordinary prudence.

§ 490, page 454, note 5.—Cf. *Stoddart v. Union Trust*, (1912) **Voidable contract affirmed.** 1 K. B. 181 (a suit for damages for breach of a voidable contract, affirms it).

§ 499, page 464, add to note 7.—So the issue of a delivery **Estoppel.** order: *McEwan v. Smith*, 2 H.L.C. 809; or warrant: *Gillman v. Carbutt*, (1889) 61 L. T. 281, raises no estoppel as being a promise *in futuro*.

§ 501, page 468, add to end of § 501.—A party to a contract **Repudiation.** who has failed to obtain from the Court a decision in his favour upon the construction of a contract, may institute a suit to set it aside—he cannot proceed by motion: *Wilding v. Sanderson*, (1897) 2 Ch. 534 C. A.

§ 504, page 476, line 15.—For “specially” read “specifically”; line 18, insert “the” between “that” and “representation”.

Page 477, line 2.—For “damages” read “remedies.”

Add after line 8.—In England an indemnity can be claimed **Making good representations.** against anything done under the contract. Farwell J., elaborately discussed the doctrine of making good in *Whittington v. Seale-Hayne*, (1900) 82 L. T. 49, where the cases are reviewed. It was held that the right of the plaintiff to be put in *statu quo* means not to be replaced in exactly the same position in all respects, otherwise a claim for damages would lie, (*Derry v. Peck*, 14 A. C. 337; *Redgrave v. Hard*, 20 Ch. D. 1, but such an action lies if the representation is fraudulent: *Brownlie v. Campbell*, 5 A.C. p. 935); but to be replaced in his position so far as regards the rights and obligations which have been created by the contract: *Adam v. Newbigging*, 13 A. C. p. 320, 34 Ch. D. p. 592, but see pp. 589, 594, 596. But the question was said to be a nice one.

§ 506, page 478, note 5.—Statements made in circulars sent **Circulars.** as advertisements but not included in the contract are not available as warranties: *Paul v. Glasgow Corp.*, (1901) 8 F. 119.

§ 514, page 488, after line 20.—The fact that a stipulation **Impossible.** might become impossible of fulfilment, does not show that it is not a condition precedent: *South British Fire & M. Ins. Co. v. Brogo Nath Shaha*, (1909) 86 C. 516, 534.

§ 518, page 491, note 2.—See too *Towerson v. Aspatria Agri. Soc.*, (1872) 27 L. T. 276, where in assessing damages a referee was directed to judge the inferiority reasonably.

Rectifying defective tenders.

§ 521, page 492, note 4.—A party after tendering a larger ship than agreed on cannot after repudiation of the contract improve his position by offering to relieve the other party of the extra tonnage: *Oceanic S. N. Co. v. Soonderdas*, (1890) 15 B. 389; but such offer might affect the damages under section 73, explanation. Cf. *Frangopulo v. Lomas*, (1902) 18 T. L. R. 461, where a tender of documents for 4,202 cases, with an allowance for 2 cases as being too many, was admitted to be bad.

Usage as test of reasonableness.

§ 532, page 502, add to note 2.—For a usage as a test of reasonableness, see *Stewart v. Cauty*, (1841) 8 M. & W. 160; *Re Leigh*, (1877) 6 Ch. D. 256 C. A.; cf. *Smith v. S. E. Ry.*, (1896) 1 Q. B. 178 (negligence tested by practice), but see *Loader v. London and India Docks Joint Co.*, (1892) 65 L. T. 674.

§ 537, page 509, note 6.—This case did not turn on a refusal to pay for the instalments delivered: *Clarke v. Burn*, (1866) 14 L. T. 439.

Failure in first instalment.

§ 539, page 513, note 6.—See too *Braithwaite v. Foreign Hard Wood Co.*, (1905) 2 K. B. 543, where the M. R. would not disagree with the dictum of Kennedy J., that a tender of inferior goods as the first instalment would give a right to repudiate the whole contract.

Election with several persons.

§ 544, page 519, note 2.—Where several persons have a right of election, the first election made by any of them stands: *Hughes v. Palmer*, (1865) 19 C. B. N. S., p. 406.

Facilities.

§ 548, page 522, note 3.—Both parties must act reasonably: *Bank of China v. American Trading Co.*, (1894) A. C. 266; *Biddell v. Clemens*, (1911) 1 K. B., p. 958 (implied term that both parties should do what is merchantilely reasonable).

Prevention where contract depends on a chance.

§ 548, page 523, note 4.—If there is prevention it makes no difference if the plaintiff's claim depends on an event which was certain or not; in such a case he can recover the value of the chance of the event happening. Such must be valued on the principle that a party is bound not merely to literally perform his contract, but so as to permit the other party to have the full benefit which it was intended he should have: *Inchbold v. Western Neilgherry Co.*, (1865) 34 L. J. C. P. 15; but it is not a universal principle that if a party in any way prevents or reduces the profit reasonably expected by the other party from the contract, he must pay damages, for he is not bound to refrain from any action unless it is contrary to the terms expressed or reasonably to be implied of the contract, though it in fact reduces the other party's profit: *Dare v. Bognor Urban District Board*, (1912) 28 T. L. R. 489.

Damages for preventing the full benefit of the contract being obtained.

§ 550, page 526, note 8.—But Collins, M. R., in *Braithwaite v. Foreign Hard Wood Co.*, (1905) 2 K.B. p. 551, held that even if the contract was kept alive a repudiation was a waiver of conditions precedent,—where the buyer declined to take delivery of an instalment: but this conflicts with the decision cited above. The rest of the court avoided the point.

Waiver where contract still open, but repudiated.

§ 551, page 527, note 4.—*Gopala Aiyar v. Ramaswamy Sastri-gal*, (1912) 22 M. L. J. 207.

§ 554, page 539, note 6.—A refusal in a C. I. F. contract to pay against documents, the buyer claiming a right to inspection before payment, was held to be a repudiation: *Clemens Horst & Co. v. Bid-dell*, (1912) A. C. 20 H. L.

Refusal to pay.

§ 555, page 542, line 5.—If the repudiation of a contract is accepted and the parties subsequently agree to substitute fresh terms, on a failure to carry out such terms the parties are relegated to their rights under the original contract; if it is the original defaulter who again is to blame, their rights are as at the time of the acceptance of the repudiation: *Dominion Coal Co. v. Dominion Iron Co.*, (1909) A. C., p. 306. If it is the other party who commits the breach, it is clear that the original defaulter cannot claim damages for any non-performance caused by or originally excused by his accepted repudiation: it seems that his damages must be assessed as at the postponed date of performance.

Breach of substituted agreement, after repudiation.

§ 556, page 542.—Delay, where time is not of the essence, does not amount to repudiation, unless such as to defeat the object of the venture: *Wyllie v. Povah*, (1907) 13 Com. Cas. 317; a contract for August-September shipment, transshipment allowed, is not avoided by five months delay owing to stranding of the ship, although the value of the goods is thereby affected as being exposed to a more competitive market: *In re Carver*, (1911) 11 Com. Cas. 59.

Delay as repudiation.

§ 565, page 562.—Where a policy contained conditions as to notice, and a claim arose before the policy was delivered to the insured, it was held that the conditions did not bind before knowledge: *Re Coleman's Depositaries*, (1907) 2 K. B. 798, Fletcher Moulton, L.J., dissenting. A devisee or legatee is not excused by ignorance of a condition in the will: *Astley v. Earl of Essex*, L. R. 18 Eq. 290; *Carter v. C*, 27 L. J. Ch. 74.

Condition unknown.

§ 570, page 568, note 4.—Nor can a party waive a term that a formal contract shall be drawn up if the completion of the contract depends thereon: *Von Hatzfeldt Wildenbury v. Alexander*, (1912) 1 Ch. 284.

Waiver of formal contract.

Brand. § 580, page 573.—The contract may make delivery of goods of a particular brand a condition precedent : *Hopkins v. Hilchcock*, (1868) 32 L. J. C. P. 154.

Time, waived. § 580, page 574, note 2.—If time is of the essence it is waived by delay: *Dupent v. British S. African Co.*, (1901) 18 T. L. R. 24.

Agreement excluding implied conditions. § 590, page 584, note 11.—See *Clarke v. Army & Navy Co. Op. Soc.*, (1903) 1 K. B., p. 163, 167 ("no warranties given with goods sold" held to apply to express warranties and not to exclude a condition of fitness implied by law ; for that plainer words would be necessary).

Alongside. § 586, page 589, note 1.—See *Cox v. Todd*, 4 L. J. (O. S.) K. B. 34.

Sale of dangerous goods. Liability to third parties. § 652, page 693, note 3.—Where a dangerous article is sold the seller's liability extends to injury to the person who buys it or to anyone into whose hands the seller ought to contemplate that it will come. But apart from contract express or implied, his sole duty is to warn, and if he does warn the buyer or the danger is apparent on the face of the article, he is not liable, although the injury is due to imperfect manufacture: *Blacker v. Lake*, (1912) 106 L. T. 333, disapproving *George v. Skivington*, 21 L. J. 491.

Set-off against agent good against principal. A set-off against an agent may be binding against the principal by estoppel if he has by his action induced the buyer to believe that the agent was selling as owner: *Cook v. Eshelby*, (1887) 12 A. C. 271; *Montagu v. Forwood*, (1893) 2 Q. B. 350. But generally an agent cannot set off a debt due to him as payment against his principal: *Pearson v. Scott*, (1866) L. R. I. C. P. 186, even if he is a del credere agent: *Catterell v. Hindle*, (1866) L. R. I. C. P. 186.

Delay as waiver of wrong method of carriage. Delay in notifying non arrival of goods may amount to a waiver of delivery to a carrier other than the one contracted for: *Ullock v. Reddelein*, (1828) Dans. & L. 6.

Condition of resale attached to sale. An entire contract may be made for sale and resale on a certain event to the seller: *Williams v. Burgess*, (1839) 10 A. & E. 499.

Set-off, not good against auctioneer. A seller at auction cannot allow a buyer to set-off a debt due to him so as to interfere with the auctioneer's lien or with an agreement assented to by the auctioneer to apply the proceeds of the sale to meet other debts: *Manley v. Berkett*, (1912) 2 K. B. 329.

§ 108, add to § 473, page 432, note 4.—*Mandlall v. Bank of Bombay*, is now under appeal to the Judicial Committee.

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